In the

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1572

APACHE COUNTY; MARGARET LEE, ARTHUR N. LEE, LARRY STRADLING, and TOM SHIRLEY, as Clerk and Members of the Apache County Board of Supervisors; MARGARET LEE, ARTHUR N. LEE, LARRY STRADLING and JAMES A. MCDONALD, individually,

Appellants,

vs.

UNITED STATES OF AMERICA; EDWARD LEVI, as Attorney General of the United States; RAUL CASTRO, as Governor of Arizona; BRUCE BABBITT, as Attorney General of Arizona; VIRGIE HEAP, as Apache County Recorder; LAVINE M. PORTER and FLORENCE PAISANO, as Justice of the Peace in Apache County; LESLIE E. GOODLUCK, KENNETH CHEE, STEVEN ASHLEY, SR., STANLEY E. ASHLEY and ANDERSON YAZZIE,

Appellees.

On Appeal from the United States Three Judge District Court for The District of Arizona

Jurisdictional Statement

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Jurisdictional Statement

The appellants, pursuant to United States Supreme Court rules 13(2) and 15, file this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the granting of the plaintiffs' permanent injunction and the denial of the defendants' requested permanent injunction, and should exercise such jurisdiction in this case.

OPINION BELOW

The three judge statutory district court for the District of Arizona filed its Opinion in this case on September 16, 1975. On September 25, 1975 appellants filed a timely Motion for Rehearing and on February 19, 1976 the Motion for Rehearing was denied and a Final Order issued implementing the earlier Opinion of the court. Neither the Opinion nor the subsequent Orders are yet officially or unofficially reported. The Opinion, Order denying Rehearing and Order Implementing the Opinion are attached hereto as Appendix A. No Findings of Fact nor Conclusions of Law were made separate from those expressed in the Opinion.

JURISDICTION

This appeal arises out of two actions filed on separate dates in the United States District Court for the District of Arizona. On October 15, 1973 certain Navajo Reservation Indians instituted action against Apache County and certain officers thereof, both individually and as public officers, claiming violation of civil and constitutional rights because of alleged malapportionment of Apache County, Arizona supervisorial districts. That action was brought pursuant to 28 U.S.C. § 1343. Shortly thereafter the defendants below added additional parties and counterclaimed contending that certain federal and state statutes allowing Navajo Reservation Indians to vote in Apache County elections were unconstitutional and that their enforcement, operation and execution should be enjoined. Defendants requested that a three judge district court be convened pursuant to 28 U.S.C. §§ 2281 and 2282 and thereafter the statutory court was convened.

Then on January 23, 1974 the United States of America filed a second suit in United States District Court of Arizona against essentially the same defendants alleging similar violations of the Indian rights pursuant to 42 U.S.C. §§ 1971(d), 1973 j (f) and 28 U.S.C. § 1345. The statutory court was also appropriate in this action pursuant to 42 U.S.C. § 1971(g) and this case was ordered consolidated with the earlier lawsuit. The defendants answered the second complaint asserting the same defense as raised by way of the counterclaim in the first action.

These consolidated actions were decided on cross motions for summary judgment wherein the Plaintiffs' motions for injunctive relief were granted and the Defendants' motion for injunctive relief was denied. The court entered its Opinion on September 16, 1975 and subsequently on February 19, 1976 entered Orders denying the Motion for Rehearing and Implementing the Opinion. It is from the Opinion and Orders that appeal is taken. The Notice of Appeal to this court was filed in the United States District Court for the District of Arizona on the 4th day of March, 1976.

The appellants herein sought to have declared unconstitutional and enjoin the enforcement, operation or execution of 8 U.S.C. § 1401(a) (2) and A.R.S. § 16-101 and implementing statutes which had the effect of allowing the Navajo Reservation Indians to vote in Apache County elections and be counted for apportionment of supervisorial districts. For this reason a statutory court was properly convened under 28 U.S.C. §§ 2281 and 2282. Therefore direct appeal to the United States Supreme Court is proper pursuant to 28 U.S.C. § 1253. In addition, the action by the United States of America seeking to require reapportionment of the Apache County supervisorial districts and enjoin alleged violations of Navajo Reservation Indian rights was grounds for convening a statutory court and therefore direct appeal to the United States Supreme Court pursuant to 42 U.S.C. § 1971(g).

The Arizona and United States statutes cited above, the validity of which is challenged, are set forth verbatim in Appendix C.

QUESTIONS PRESENTED

The lower court held that Navajo Tribal Indians are entitled to vote in Apache County elections because they were found to be citizens of the United States and of Arizona under 8 U.S.C. § 1401(a) (2) and because they were found to qualify as voters under A.R.S. § 16-101. Therefore the court concluded that the three supervisorial districts in Apache County should be reapportioned under the one-man, one-vote rule according to agreed population figures. This will place at least two of the three supervisorial districts entirely within the Navajo Reservation and permit Tribal Indians to completely control the taxing and governmental power of Apache County from which taxes and powers those Tribal Indians are essentially immune.

The substantial questions presented by this appeal are whether 8 U.S.C. § 1401(a) (2) and/or A.R.S. § 16-101 are unconstitutional and whether their enforcement, operation and execution should be enjoined in order to prevent Navajo Tribal Indians from voting in Apache County elections or being counted as part of the population in the apportionment of county supervisorial districts upon *any* of the following grounds:

I. The 14th Amendment to the United States Constitution provides:

> "Section 1. All persons born or naturalized in the United States *and subject to the jurisdiction thereof are citizens* of the United States and of the State wherein they reside . . ."
>
> "Section 2. Representatives shall be apportioned among the several States according to their respective

> number, counting the whole number of persons in each State, *excluding Indians not taxed*". (emphasis supplied).

8 U.S.C. § 1401(a) (2) is an attempt to confer citizenship upon Tribal Indians contrary to the foregoing sections of the 14th Amendment as interpreted by the United States Supreme Court in *Elk v. Wilkins,* 112 U.S. 94 (1884).

II. Navajo Tribal Indians are not residents of Arizona by virtue of the Arizona Enabling Act, the Navajo Treaty of 1868 and the court decreed jurisdictional limitations of state power over Navajo Tribal Indians and their Reservation.

III. Congress, our highest federal and state courts, and the Navajo Treaty of 1868 have consistently provided that Navajo Tribal Indians owe no allegiance to the State of Arizona and that such Indians are immune from all significant state and local laws and taxes. To permit Tribal Indians to participate in and to control a government to which they owe no allegiance and to which government's taxes and laws they are essentially immune violates the non-Indian appellants' constitutional rights to due process of law and equal protection of law under the 5th and 14th Amendments to the United States Constitution.

IV. If Navajo Tribal Indians are permitted to vote in Apache County elections and control the government of that county, they will thereby impose upon the appellants and all other non-Indian citizens of Apache County "punishment, pains, penalties, taxes, licenses and exactions of every kind", 42 U.S.C. § 1981, to which the Navajos themselves are not subject. This will violate appellants' civil rights provided for in 42 U.S.C. § 1981.

V. Navajo Tribal Indians cannot, under the 14th and 15th Amendments, vote in Apache County elections when

the voting laws of Arizona legally have no application to Indians on the Reservation, and when such election laws would, in any event, be criminally and civilly unenforceable against Tribal Indians.

STATEMENT OF THE CASE

Apache County, Arizona is a long, narrow county. A portion of the Navajo Reservation comprises the Northern half of the county. The Reservation population is almost entirely Navajo Tribal Indians; these Tribal Indians constitute three-fourths of the population of Apache County. The remaining 25% of the population is primarily Negros, Mexicans and Anglos.

The Navajo Tribal Indians have not been assimilated into the political process of the State of Arizona because that assimilation process requires the consent of the Tribe under 25 U.S.C. §§ 1321 and 1322. Therefore, by virtue of many court rulings, various congressional acts, the Navajo Treaty of 1868 and the Arizona Enabling Act, Arizona and its political subdivisions such as Apache County have no power to tax the property of the Tribal Indians on the Reservation, have no power to impose state income tax on Reservation earned income, and have no power to enforce any state or county laws and regulations either civilly or criminally against Tribal Indians on the Reservation.

Apache County is governed by three supervisors, one elected from each supervisorial district. There are, of course, other county officers elected at large such as a County Sheriff, a County Treasurer and a County Assessor. For many years two of the County supervisorial districts have been located entirely off the Reservation and a third supervisorial district encompassed all of the Navajo

Indian Reservation and a portion of the land off the Reservation. In the past only the non-Indians have been counted in apportionment of the supervisorial districts.

On October 15, 1973 certain Navajo Tribal Indians, who are some of the appellees herein, instituted an action against Apache County and its Board of Supervisors, as individuals and in their official capacity, claiming violation of the civil and constitutional rights of these Indians because of alleged malapportionment of the supervisorial districts.

The county officers who are appellants herein are, with the exception of Tom Shirley, residents and taxpayers within the county and are subject to all county and state laws. These county officers, in their official capacity and, with the exception of Tom Shirley, as individuals answered the complaint and counterclaimed contending that federal and state statutes which the Plaintiff construed as allowing Navajo Reservation Indians to vote in Apache County elections and be counted for purposes of reapportionment were unconstitutional and that their enforcement, operation and execution should be enjoined. Consequently a three judge statutory court was convened pursuant to 28 U.S.C. §§ 2281 and 2282.

On January 23, 1974 the United States of America filed a second suit in the United States District Court for Arizona against essentially the same Defendants alleging similar violations of Indian rights. Because of the similarity of the parties and the issues, the case was ordered consolidated with the prior suit and the Defendants raised the same contentions expressed in the earlier suit in answer to the second suit.

It was conceded by the Defendants in the lower court that if Navajo Tribal Indians are entitled to vote and to be weighed equally in the population count for purposes of

apportionment, a reapportionment of supervisorial districts would have to occur. Such a reapportionment would place two and perhaps part of the third supervisorial district entirely upon the Reservation by virtue of agreed population figures.

However, the Defendants contended that 8 U.S.C. § 1401 (a) (2) and A.R.S. § 16-101 were unconstitutional in that Navajo Tribal Indians cannot constitutionally be permitted to vote in Apache County elections or be considered as part of the population for apportionment of the supervisorial districts for several separate and distinct reasons: (1) The Tribal Indians are not citizens of the United States or of Arizona. (2) The Tribal Indians are not residents of Arizona. (3) Even if the court somehow concluded that the Tribal Indians were citizens of the United States and citizens or residents of Arizona, they nevertheless could not participate in and control a government to which they owe no allegiance and pay no taxes as this would violate the constitutional and civil rights of the minority of non-Indians in Apache County under the 5th and 14th Amendments to the United States Constitution and under Section 1981 of the Civil Rights Act. (4) Since Apache County election laws do not apply upon the Reservation and could not, in any event, be legally enforced against Tribal Indians on the Reservation, their exercise of the franchise in Apache County elections violates the non-Indian rights under the 14th and 15th Amendments to the Constitution.

The Defendants and the Plaintiffs below all filed Motions for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The Defendants' motion sought to enjoin the operation, enforcement and effect of 8 U.S.C. § 1401(a) (2) and A.R.S. § 16-101 et seq. to the extent they were construed to allow Navajo Tribal Indians to vote in

Apache County elections for the reasons previously stated. The Plaintiffs sought to enjoin the alleged malapportionment of the supervisorial districts and have a reapportionment ordered.

On September 16, 1975 the District Court of Arizona entered its Opinion granting the Plantiffs' Motions for Summary Judgment and denying the Defendants' Motion. A Motion for Rehearing was filed on September 25, 1975. On February 19, 1976 the court entered an Order denying the Motion for Rehearing as well as an Order Implementing the September 16th Opinion, presumably pursuant to Rule 58 of the Federal Rules of Civil Procedure. Paragraphs 3 and 4 of the Order were amended *nunc pro tunc* in a supplemental post-trial order dated March 22, 1976.

The court's February 19, 1976 Order states at the outset:

> "On September 16, 1975, this court, sitting as a three judge court pursuant to 28 U.S.C. §§ 2281, 2282, and 2284 issued its opinion and judgment in the consolidated cases captioned above."

Therefore, a Notice of Appeal to this court was filed on March 4, 1976 pursuant to 28 U.S.C. § 1253.

THE QUESTIONS SUBMITTED ARE SUBSTANTIAL

I. Introduction

Appellants submit that the questions presented by this appeal are substantial and require plenary consideration for their proper resolution. The ruling of the Federal District Court permits a group of persons who are not subject to the government of Apache County and who owe no allegiance to that government to nevertheless rule over a minority of persons who are subject to that government. The action of the lower court is absolutely contrary to the

most fundamental principal of democratic government that those who run the government must be subject to the government.

The Minnesota Supreme Court in *Opsahl v. Johnson,* 138 Minn. 42, 163 N.W. 988, 998 (1917) in discussing the right of Tribal Indians to vote stated:

> "It cannot for a moment be considered that the framers of the Constitution intended to grant the right of sufferage to persons who were under no obligation to obey the laws enacted as a result of such grant. Or, in other words, that those who did not come within the operation of the laws of the state, nevertheless have the power to make and impose laws upon others. The idea is repugnant to our form of government. No one should participate in the making of laws which they need not obey."

Although later overruled, the Arizona Supreme Court in *Porter v. Hall,* 34 Ariz. 308, 322, 271 P. 411 (1928) said of the Indian right to vote in Arizona elections:

> "It is almost unheard of in a democracy that those who make the laws need not obey them."

The ubiquitous jurisdictional restrictions upon state and local control over Navajo Tribal Indians and their Reservation creates five separate and distinct grounds for holding that these Tribal Indians cannot constitutionally exercise the franchise in Apache County elections. With the exception of *Elk v. Wilkins, supra,* the United States Supreme Court has not previously considered any of the questions presented in this appeal.

II. The 14th Amendment to the United States Constitution foreclosed Tribal Indians from National and State Citizenship; 8 U.S.C. § 1401 (a) (2) Is Therefore an Unconstitutional Attempt to Confer Citizenship Upon Tribal Indians Because It Did Not Grant the States Jurisdiction over Those Indians.

The 14th Amendment to the United States Constitution provides:

> "Section 1. All persons born or naturalized in the United States *and subject to the jurisdiction thereof are citizens* of the United States and of the State wherein they reside..."
>
> Section 2. Representatives shall be apportioned among the several States according to their respective number, counting the whole number of persons in each State, *excluding Indians not taxed."* (emphasis supplied).

In only one case has the United State Supreme Court considered the language of the 14th Amendment as it relates to the citizenship of Reservation Indians. In that case, *Elk v. Wilkins,* 112 U.S. 94 (1884), the Supreme Court held that a Tribal Reservation Indian was not a citizen of the United States or any State because they were not "completely subject to their political jurisdiction and owing direct and immediate allegiance", (28 L.Ed. at 646), and because they are not taxed. The court stated:

> "But Indians not taxed are still excluded from the count, for the reason that they are not citizens. Their absolute exclusion from the basis of representation in which all other persons are now included, is wholly inconsistent with their being considered citizens." (28 L. Ed. at 646).

It is inconceivable that Reservation Indians cannot be counted for apportionment purposes in congressional districts and yet can be counted for apportionment purposes

in Apache County supervisorial districts. *Elk v. Wilkins* has never been overruled or distinguished on its holding concerning citizenship. Consequently, the lower court ruling in this case is diametrically opposed to the United States Supreme Court decision in *Elk v. Wilkins*.

In 1924 Congress sought to make Tribal Indians citizens by the enactment of 8 U.S.C. § 1401 which provides in pertinent part:

> "(a) The following shall be nationals and citizens of the United States at birth:
>
> (1) A person born in the United States, and subject to the jurisdiction thereof,
>
> (2) a person born in the United States to a member of an Indian, Eskimo, Aleutian or other aboriginal tribe . . ."

However, in passing the law Congress failed to consider the import of either the 14th Amendment as quoted above or the Supreme Court's interpretation of the 14th Amendment in *Elk v. Wilkins*. Had the Congress also provided that the Tribal Indians would become subject to the jurisdiction and taxing powers of the governmental entities to the same extent as other citizens, the statute would have lawfully accomplished its purpose. However, the statute, as interpreted by subsequent court rulings, apparently only conferred the rights of citizenship upon Tribal Indians without the commensurate responsibilities of citizenship such as subjection to the jurisdictional and taxing powers of the state and local governments.

There is no question that the powers of Apache County and the State of Arizona over the Navajo Reservation Indians are almost nonexistent. *United States v. Kagama,* 118 U.S. 375 (1886) (Tribal Indians held to have no allegiance to the state); *Williams v. Lee,* 358 U.S. 217 (1959) (Arizona lacks civil jurisdiction over acts by Indians on the Reservation); *McClanahan v. State Tax Commission,* 411 U.S. 164 (1973) (Arizona cannot tax income earned by Indians on the Reservation); *Commissioner of Taxation v. Brun,* 174 N.W.2d 120 (Minn. 1970) (Process cannot be served by a Sheriff on the Reservation); *Williams v. Lee,* 358 U.S. 217 (1959) (Arizona has no criminal jurisdiction over Indians on the Reservation).

The phrase "Indians not taxed" in the 14th Amendment must refer to the power of the state to tax since state taxes, principally state property taxes, and not federal income taxes were the types of taxes existing when the 14th Amendment was enacted. In what is probably the most scholarly study ever undertaken concerning citizenship status of Indians, the author remarks:

> "Thus, 'Indians not taxed', 'Indians not subject to the jurisdiction' of a state, and 'Indian Tribes' are synonymous." *Note, Sovereignty, Citizenship and the Indian,* 15 ARIZ. L. REV. 973, 983 (1973).

Many courts have recognized that when an Indian becomes a citizen, he thereby becomes subject to taxation, state jurisdiction and all the responsibilities of citizenship. *In re Heff,* 197 U.S. 488 (1905); *Ex parte Savage,* 158 F.205 (C.A. Kan. 1908); *United States v. Hester,* 137 F.2d 145 (10th Cir. 1943); *State v. Morrin,* 136 Wisc. 552, 117 N.W. 1006 (1908); *State v. McAlhaney,* 220 N.C. 387, 17 S.E.2d 352 (1941); *Colbert v. Roadhouse,* 279 P.2d 349 (Okla. 1955).

The United States Supreme Court in *Laria v. United States,* 231 U.S. 9, 22 (1913) stated:

> "Citizenship is membership in a political society, and implies a duty of allegiance on the part of the member and a duty of protection on the part of the society.

> These are reciprocal obligations, one being compensation for the other."

Similarly, this court stated in *Miller Brothers Co. v. Maryland,* 347 U.S. 340, 345 (1954) that:

> "Since the 14th Amendment makes one a citizen of the state wherein he resides, the fact of residence creates universally recognized reciprocal duties of protection by the state *and of allegiance and support by the citizen.* The latter obviously includes a duty to pay taxes, and their nature and measure is largely a political matter." (emphasis supplied).

The question of Navajo Tribal citizenship becomes much more than an academic exercise when those alleged Indian "citizens" are permitted to govern a minority of non-Indians in the county when the Indian "citizens" are not subject to the laws and taxes which they shall impose upon the non-Indian minority. This unique and dangerous principal which has been approved by the district court demands the thorough and closest scrutiny of the United States Supreme Court.

III. The Navajo Tribal Indian Is Not a Resident of Arizona and Is Therefore Not Entitled to Vote in Apache County Elections Under A.R.S. § 16-101.

Section 20 of the Arizona Enabling Act provides:

> "That the people inhabiting said proposed state do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian Tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian Tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the congress of the United States; . . ."

The Navajo Treaty of 1868 states in Article 9 that:

> "In consideration of the advantages and benefits conferred by this Treaty, and the many pledges of friendship by the United States, the Tribes who are parties to this agreement hereby stipulate that they will relinquish all right to occupy any territory outside their Reservation, as herein defined, but retain the right to hunt on any unoccupied land contiguous to their Reservation, so long as the large game may range thereon in such numbers as to justify the chase; . . ."

Article 13 of the Treaty also states:

> "And it is further agreed and understood by the parties to this Treaty, that if any Navajo Indian or Indians shall leave the Reservation herein described to settle elsewhere, he or they shall forfeit all the rights, privileges and annuities conferred by the terms of this Treaty; . . ."

The Enabling Act and the 1868 Treaty make it difficult to conceive that the Navajo Tribal Indian can be a resident of Arizona, but court pronouncements which have limited almost every form of jurisdiction over the Tribal Indian leaves no doubt that he cannot be a resident of Arizona. Process cannot even be served on an Indian while he is on the Reservation since the Sheriff has no jurisdiction thereon. *Langford v. Monteith,* 102 U.S. 145, 147 (1880); *Annis v. Dewey County Bank,* 335 F.Supp. 133 (D.S.C. 1971); *Martin v. Denver Juvenile Court,* 493 P.2d 1093 (Colo. 1972); *County of Beltrami v. County of Hennepin,* 264 Minn. 406, 119 N.W.2d 25, (1963). It is highly doubtful that civil jurisdiction could even be obtained

through the long arm statutes or that a Navajo Tribal Indian could be extradited on a criminal matter. But even if these were methods of obtaining personal jurisdiction over Tribal Indians, they only emphasize the point that the Navajo Tribal Indian is not a resident of Arizona. Obviously, a state does not extradite its own residents present within the state, and the long arm statute cannot be utilized to obtain service over one who is a resident within the state.

The Arizona Supreme Court has held that:

> "Proceedings in the Navajo Tribal Court must be treated the same as proceedings in a court of *another state or foreign country*, . . ." *In re Lynch's estate,* 92 Ariz. 354, 357, 377 P.2d 199 (1962) (emphasis supplied).

See *Morgan v. Colorado River Indian Tribe,* 103 Ariz. 425, 428, 433 P.2d 421 (1968) (fn. 1). The United States Supreme Court in *United States v. Kagama,* 118 U.S. 375, 383 (1868) stated:

> "These Indian Tribes are the wards of the nation. . . . *they owe no allegiance to the states,* and receive from them no protection." (emphasis supplied).

Why does Arizona, like all other states, require residency as a qualification for one to vote and hold public office? Obviously, it is to assure that persons who vote and consequently who may hold public office have a valid interest in the government which they propose to control and to assure that they are subject to the criminal and civil processes of that jurisdiction in order to assure that their behavior as voters and their behavior in public office conforms to the laws of that government. See *State v. Van Beek,* 87 Iowa 569, 54 N.W. 525 (1893).

Certainly, a person who exists totally beyond the control of the state government even to the point of the state

government being unable to enforce its elections laws against that individual (see Section VI *infra*) cannot be a resident of the state for purposes of voting in the elections of that state. To allow a Tribal Indian to control that government which has abolutely no control over the Tribal Indian defies all credulity. This court has not previously examined the serious consequences of a Tribal Indian's participation in and control of a government when that government has no reciprocal power or control over the Tribal Indian.

IV. The Constitutional Rights of the Non-Indian Appellants to Due Process of Law and Equal Protection of the Law Will Be Seriously Infringed Upon if Navajo Tribal Indians Are Permitted to Participate in and Thereby Control the Government of Apache County.

Even if the Navajo Tribal Indian were deemed to be a citizen of the United States and a resident of Arizona, he still may not constitutionally govern through the exercise of the franchise in a government to which he is not subject. The constitutional violations are manifest for several reasons.

A. SEVENTY-FIVE PERCENT OF THE POPULATION OF THE COUNTY WILL IMPOSE TAXES UPON A MINORITY OF TWENTY-FIVE PERCENT WHO ARE SUBJECT TO THE TAX.

Seventy-five percent of the population of Apache County are Navajo Tribal Indians who, *even though they may be substantial property owners,* are nevertheless, by declaration of congress and the supreme court, immune from the county property tax which is imposed upon the twenty-five percent minority of non-Indians in the county.

The non-taxpaying Indians can thereby tax and destroy the businesses, homes and property interests of the non-Indians in the county by imposing excessive taxation.

This constitutes a taking of property without due process of law. Taxation without representation, or without the consent in some form of those who are to be taxed, is a vicious principal contrary to democratic government. The Supreme Court of Michigan stated:

> "The only security against an abuse of power being found in the structure of government itself *is that in imposing a tax the legislature acts upon its constituents." C.F. Smith Co. v. Fitzgerald,* 279 Mich. 659, 259 N.W. 352, 356 (1935) (emphasis supplied).

The Navajo Indian Board of Supervisors in Apache County in this case, will not impose the tax upon their constituents—the Tribal Indian population which is 75% of the population of the county. Thus, there is no security against the abuse of the taxing power.

The courts and congress have determined the Tribal Indian must be immune from taxes because he is financially non-competent or incompetent to govern his own economic affairs. This is why the Bureau of Indian Affairs was established. *Squire v. Capoeman,* 351 U.S. 1, 10 (1956); *Freeman T. Walker,* 37 T.C. 962, 971 (1962). Under what system of logic can the Navajo govern Apache County, impose taxes on its residents and spend those taxes when he cannot govern his own property or survive taxation himself. The irony boggles the mind.

Patrick Henry in the Stamp Act Resolution of May 29, 1765 stated:

> "The taxation of the people by themselves or by persons chosen by themselves to represent them, who can only know what taxes the people are able to bear, and the easiest mode of raising them, and are equally affected by such taxes themselves, is the distinguishing characteristic of British freedom and without which, the ancient constitution cannot subsist." R.D.

> Meade, Patrick Henry: Patriot in the Making 170 (1957).

The inequity of taxation without representation and representation without taxation also constitutes a deprivation of equal protection of the law. If indeed the Tribal Indian is a citizen and resident of Arizona then there is no conceivable justification for permitting him to avoid taxes on his property and yet be given the right and power to impose that same tax upon similar property owned by a non-Indian. Such a distinction is founded entirely upon race because even the non-Indians who live on the Reservation must pay the tax. The classification is constitutionally suspect. *McLaughlin v. Florida,* 379 U.S. 184 (1964).

B. THE CONSTITUTIONAL RIGHTS OF THE NON-INDIAN APPELLANTS TO DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW ARE VIOLATED IF INDIANS ARE PERMITTED TO VOTE IN COUNTY ELECTIONS WHILE THE STATE COURTS LACK JURISDICTION OVER THE TRIBAL INDIAN AND THE STATE LAWS ARE DEEMED INAPPLICABLE ON THE RESERVATION.

> "[S]tate laws generally are not applicable to Tribal Indians on an Indian Reservation except where congress has expressly provided the state laws shall apply." Cohen, Federal Indian Law 845 (1958).

Furthermore, it is axiomatic that the states cannot serve either criminal or civil process upon Reservation Indians while they are located on the Reservation and that the Indian cannot be criminally or civilly prosecuted for acts occurring on the Reservation. (cases cited at 11 *supra*). If seventy-five percent of the county's population consists of Navajo Indians it is reasonable to assume that Navajos will be elected to county offices and it is a *certainty* that they will be elected to two of the three supervisorial seats if the tribal Indian is to be weighted equally with the non-Indian in supervisorial apportionment.

What then is the remedy to control the malfeasance or nonfeasance of these Tribal Indians in public office? The state court would not have jurisdiction over many felonies which the Navajo Tribal officer might commit such as embezzlement of public funds, election fraud, extortion, forgery, and crimes involving narcotics. While A.R.S. § 38-291(8) would require removal of the Tribal Indian from office in the commission of these crimes, jurisdiction could not be obtained over either his person or the subject matter in order to remove him from office. The courts have neither personal nor subject matter jurisdiction to punish the Indians for any misdemeanors committed in office if the act occurred on the Reservation or if the Navajo remained at his home on the Reservation.

Most civil remedies against such officers would also be non-existent. The county would have no control over personal property, such as road equipment, sent onto the Reservation and would lack jurisdiction over buildings and structures placed upon the Reservation by a Navajo Board of Supervisors.

The appellants have no process by which they can assure that the property of the taxpayer is secure from waste, mismanagement and mis-appropriation of tax funds and taxpayers property. The lack of any process to secure such property and monies obviously constitutes a violation of due process.

The non-Indian appellants, however, are subject to all of these criminal and civil penalties and regulations while they hold office. If the Tribal Indian office holders are not subject to these same controls, then the non-Indian appellants are denied equal protection of the law. Again, imposing these sanctions upon non-Indian office holders while Tribal Indian office holders are immune from these crim-

inal and civil sanctions is a distinction based entirely upon race and is constitutionally suspect. *McLaughlin v. Florida,* 379 U. S. 184 (1964).

V. The Civil Rights of the Non-Indian Appellants Under 42 U.S.C. § 1981 Will Be Violated if the Navajos Are Entitled to Vote in Apache County Elections.

42 U.S.C. § 1981 of the Civil Rights Act provides:

> "All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, to be parties, to give evidence, and to full and equal benefit of the laws and proceedings for the securities of persons and property as enjoyed by white citizens, *and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind and to no other.*" (emphasis supplied).

The protection of this statute obviously extends to the Anglos, the Negros and the Mexicans in Apache County if their civil rights are violated. *Central Presbyterian Church v. Black Liberation Front,* 303 F.Supp. 894 (D.Mo. 1969). The Navajo Tribal Indians are not subject to the same punishment, pains, penalties, taxes and licenses as are the other residents of Apache County. This distinction based on race is certainly constitutionally suspect. *McLaughlin v. Florida,* 379 U. S. 184 (1964); *Graham v. Richardson,* 403 U. S. 365 (1971).

However, the unconstitutionality is seriously compounded when those Tribal Indians who are not subject to the laws and taxes of the State of Arizona and Apache County are permitted to make those laws and impose those taxes upon the minority of the population of the county which is subject to the laws and taxes.

Our courts in the civil rights cases have frequently been faced with the constitutionality of applying different *rights* to certain citizens. However, seldom if ever has the question of the constitutionality of imposing different *responsibilities* upon different citizens been examined under 42 U.S.C. § 1981. This is because no race in this country, except for the Indian, has ever been granted immunity from *responsibilities* imposed by law. However, the Supreme Court of New Jersey in *Washington Nat. Ins. Co. v. Bd. of Review*, 64 A.2d 443, 447 (N.J. 1949) stated:

> "The equal protection of the laws means that no person or class of person shall be denied the protection of the laws enjoyed by other persons or classes of persons under similar conditions and circumstances, in their lives, liberty, property and in the pursuit of happiness, *both as respects priveleges conferred and burdens imposed. . . . This includes equality of exemption from liabilities.* (citations omitted) (emphasis supplied).

The non-Indian appellant Board of Supervisors members in this case are subject to all of the punishment, pains, penalties and taxes placed upon public officers generally in the State of Arizona. They are also subject individually to the taxes they impose as members of the Board of Supervisors. On the other hand the ruling of the lower court will permit Navajos to vote and hold office with almost total immunity from these same punishments, pains, penalties and taxes that the non-Indian appellant is subject to. We cannot conceive of a more obvious violation of the Civil Rights Act.

VI. The 14th Amendment Equal Protection and Due Process Clauses as Well as the 15th Amendment Would Prohibit Navajos from Voting in Apache County Elections Where the Arizona Election Laws Have No Application on the Reservation and Would, In Any Event, Be Civilly and Criminally Unenforceable Against Navajo Tribal Indians.

The United States Congress has never enacted legislation to make Arizona election laws applicable on the Reservation; nor has Congress attempted to make the Arizona civil and criminal statutes for enforcing the election laws applicable to Tribal Indians on the Reservation. Therefore, it is clear that neither the election laws nor their enforcement provisions apply on the Reservation or to Reservation Indians. COHEN, FEDERAL INDIAN LAW 845 (1958).

Consequently, there is no due process by which the appellants can legally carry out elections on the Reservation. In any event, there is no due process by which they could enforce criminal and civil process and penalties against Indians who would violate election laws on the Reservation even if those laws were applicable. A fair and honest election cannot be insured.

While the lower court has stated that the Navajo Tribal Indians may vote within supervisorial districts located entirely upon the Reservation, the Arizona voting laws which apply off the Reservation will not apply to those Tribal Indians voting on the Reservation. This constitutes a clear violation of the equal protection of the laws.

Finally, under the 15th Amendment to the United States Constitution, the vote of the appellants and other Anglos, Negros and Mexicans have no sanctity because the Tribal Indians could vote tombstones, Indians from New Mexico and Utah which adjoin Apache County or engage in almost every conceivable violation of election law to the detriment of the vote of those off the Reservation. This is certainly a

denial and abridgment of the right of non-Indians in Apache County to vote. Again, the distinction is based entirely upon race.

This point was recognized by the Minnesota Supreme Court in *Opsahl v. Johnson,* 138 Minn. 42, 163 N.W. 988, 990 (1917) wherein the court stated:

> "To emphasize this situation, we merely need to call attention to the fact that no matter in what respect Tribal Indians, not citizens, would violate elections laws, they could not be punished provided the acts were committed on the Reservation."

The election of a Navajo could not even be contested under Arizona law if the Navajo chose to stay on the Reservation for twenty days after the canvass and declaration of result since A.R.S. § 16-1205 requires the officer to be served with a Summons and Complaint and the case actually tried within *twenty days* after the canvass and declaration of result. Also, the Sheriff could not serve subpoenas on the Navajos to testify in cases concerning election irregularities occurring on the Reservation.

We cannot conceive of a greater violation of due process than a system where there is no process to enforce and control the very basis of the democracy—the voting laws. Elections will be a farce.

VII. If the Navajo Tribal Indian Has Any Constitutional Right Relative to Voting in Apache County Elections, a Balancing of Constitutional Rights Weighs in Favor of Their Not Being Permitted to Vote.

For the reasons heretofore stated appellants contend that the Tribal Indian has no right to vote in Apache County elections. But even if this court determined that the Navajo Tribal Indian was vested with some semblance of right, they do not possess the requisite interest in county elections

to sanction a violation of the appellants' constitutional rights. This case is clearly distinguishable from *Kramer v. Union Free School District,* 395 U.S. 621 (1969), *Cipriano v. Houma,* 395 U. S. 701 (1969) and *City of Phoenix v. Kolodeziejski,* 399 U. S. 204 (1970). In those cases the court found the persons sought to be excluded from exericsing the franchise as substantially affected or directly interested in the matter voted upon.

In Apache County, however, the Navajo Tribal Indians are almost totally unaffected by any of the governmental process of Apache County. They do not pay any of the taxes imposed by the county even though they may in fact own property that would normally be subject to county taxes if they were not Indians. Practically all county and state laws and regulations have no application to the Tribal Indian. The Tribal Indian is not subject to the jurisdiction of the courts of Apache County. The Tribal Indians have been classified as a nation within a nation, a dependent nation and a soverign entity.

In *Evans v. Cornman,* 398 U.S. 419 (1970) the court stated:

> "Moreover the right to vote, as the citizen's link *to his laws and government,* is protective of all fundamental rights and privileges." (398 U.S. at 422) (emphasis supplied).

Clearly the laws and government of Arizona and Apache County are not the Tribal Indians' laws and government—they are not the laws and government of the Navajo Nation. The laws of Apache County can have no force within their nation. In *Evans,* the court also stated that the federal enclave residents whose right to vote was questioned in the case were subject to process and jurisdiction of the state

courts. This is entirely untrue in the case of the Navajo Tribal Indian.

To conclude that the Navajos have a substantial interest in the government of Apache County is to pervert the meaning of the words. The Navajo Reservation is financed almost entirely from Navajo Tribal funds and federal government monies, neither of which flow through or into the government of Apache County. It is clear that the Navajos do not have a sufficient interest in Apache County government to be allowed to vote and thereby control that government to which they owe no allegiance. On the other hand, there is no more compelling state interest than for government to assure that only those persons who are subject to the government may rule over the people within that government.

In the reapportionment case of *Avery v. Midland County*, 390 U.S. 474, 484 and 485 (1968) the Supreme Court stated:

> "We hold today only that the constitution permits no substantial variation from equal population in drawing districts for units of local government *having general governmental powers over the entire geographic area served by the body.*" (emphasis supplied).

Without any doubt this local government of Apache County has no general governmental power over the entire geographic area served by the body. It has no power over ½ of the land area of Apache County or ¾ of its people. Surely, then, they shall not be considered as a part of the basis for apportionment of supervisorial districts.

VIII. Conclusion

This court is faced with the question of whether one who is unwilling to be subservient to the law can nevertheless make the law. Can the Tribal Indian inflict the pains and responsibilities of citizenship on non-Indians while he himself is immune from those pains and responsibilities? These constitutional issues affect thousands of non-Indians living in the vicinity of Reservations. The questions are substantial and require full briefing and argument before this court.

Respectfully submitted this 15th day of April, 1976.

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CERTIFICATE OF SERVICE

As shown by the separately filed Certificate of Service, which lists the persons served with copies of this Jurisdictional Statement and its Appendix, service has been made upon all parties of record.

MITCHEL D. PLATT

Appendix A

In the United States District Court
for the District of Arizona

Filed September 16, 1975

Leslie E. Goodluck, et al., Plantiffs, vs. Apache County, et al., Defendants.	CIV. 73-626 PCT (WEC)
United States of America, Plantiff, vs. State of Arizona, et al., Defendants.	CIV. 74-50 PCT (WEC)

OPINION AND JUDGMENT

Before TRASK, Circuit Judge, and CRAIG and COPPLE, District Judges

CRAIG, District Judge

The above entitled causes of action were consolidated for hearing cross motions for summary judgment before a three-judge court.

Plaintiffs in both actions seek injunctive relief and in Cause No. Civ. 73-626, plaintiffs also seek declaratory relief.

This court has jurisdiction pursuant to Title 28, U.S.C. §§ 2281 and 2282. This court has subject matter jurisdiction, pursuant to Title 28, U.S.C. §§ 1343, 1345, 2201 and Title 42 U.S.C. §§ 1971(d), 1971(j)(F), 1981, and 1983.

Apache County is a political and geographical subdivision of the state of Arizona. It is governed by a Board of Supervisors, which exercises general governmental authority in the county, including the authority to define the territorial limits of supervisorial districts within the county. There have been established by appropriate action, three

supervisorial districts. Each district is represented by one supervisor, who exercises one vote. The districts are numerically designated as 1, 2, and 3.

The United States census for 1970 discloses the following approximate population distribution among the three districts within the county: District 1, 1,700; District 2, 3,900; District 3, 26,700.

Most of District 3 includes within its boundaries, that portion of the Navajo Indian Reservation, lying within Apache County. Of the total population within District 3, 23,600 are Indian. Of the total population within District 2, 300 are Indian. Of the total population of District 1, 70 are Indian.

Very little property taxable by Apache County is owned by Indians or is owned by the Navajo tribe.

Plaintiffs assert:

1. The apportionment described herein constitutes a denial of equal protection of the laws of the state of Arizona and the Fourteenth Amendment to the Constitution of the United States and is in violation of Title 42, U.S.C. §§ 1981 and 1983.

2. The apportionment described herein constitutes an abridgement or denial of the right to vote on account of race or color in violation of the Fifteenth Amendment to the Constitution of the United States and is in violation of the Voting Rights Act of 1965, 42 U.S.C. § 1973.

3. The apportionment described herein constitutes a distinction by race in the exercise of the Right to Vote in violation of 42 U.S.C. § 1971(a)(1).

4. The apportionment described herein constitutes a racially discriminatory application of the voting laws of Arizona in violation of 42 U.S.C. § 1971(a)(2)A.

Defendants assert:

1. 8 U.S.C. § 1401(a)(2) is an unconstitutional attempt to make reservation Indians citizens of the United States.

2. The immunity from taxes bars Indians from the right to vote under the Fifth and Fourteenth Amendments to the Constitution of the United States.

3. By way of counterclaim, defendants assert the Indians are not citizens under the Constitution and laws of the United States entitling them to vote.

Defendants raise other issues not pertinent to the disposition of these cases.

The primary issue which would appear to be dispositive of the cases before us is whether 8 U.S.C. § 1401(a)(2) is constitutional.

8 U.S.C. § 1401 provides:

> "(a) The following shall be nationals and citizens of the United States at birth:
>
> (1) a person born in the United States, and subject to the jurisdiction thereof;
>
> (2) a person born in the United States to a member of an Indian, Eskimo Aleutian, or other aboriginal tribe: *Provided,* That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property: ***"

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States *and of the State wherein they reside.*" (Emphasis supplied).

In the *Slaughter House Cases,* 16 Wall. 36 (1873), both the majority and dissenting opinions recognized the derivative nature of the right to state citizenship. It was most aptly stated by Mr. Justice Bradley in his dissenting opinion: "The question is now settled by the Fourteenth Amendment itself, that citizenship of the United States is the primary citizenship in this country, and that state

citizenship is secondary and derivative, depending upon citizenship of the United States and the citizen's place of residence. The states have not now, if they ever had, any power to restrict their citizenship to any classes or persons." *Id.* at 112.

That the Indians here involved are residents of Arizona is of little doubt. *See Harrison v. Laveen,* 67 Ariz. 337; *Shirley v. Superior Court,* 109 Ariz. 510.

The basis of defendants' argument is primarily founded on the case of *Elk v. Wilkins,* 112 U.S. 94 (1884), wherein the court analyzed §§ 1 and 2 of the Fourteenth Amendment and held that a reservation Indian is not a citizen of the United States. *Elk* was an action filed by an emancipated Indian against the registrar of one of the wards of the city of Omaha for refusing to register him as a qualified voter.

The court first held that the clause "subject to the jurisdiction thereof" found in the first paragraph of the Fourteenth Amendment meant completely subject to the jurisdiction and owing direct and immediate allegiance. The court then found that Indians born within the territorial limits of the United States owed immediate allegiance to their tribe first. The court supported this conclusion by looking at the second section of the Fourteenth Amendment which states "Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, *excluding Indians not taxed.*" (Emphasis added). This absolute exclusion from the basis of representation was found to be wholly inconsistent with the concept of citizenship. *Id.* at 102.

Defendants contend that under *Elk* the reservation Indian is not a citizen because at the time of the passage of 8 U.S.C. § 1401 the reservation was still not subject to

the jurisdiction of the United States and that they were still not taxed by the states.

In 8 U.S.C. § 1401, the words "subject to the jurisdiction thereof" are not found in subsection (a)(2) as it is in (a)(1).

Defendants argue that as a result of this omission, Indians need not be subject to the jurisdiction of the United States. The Fourteenth Amendment provides for only two ways of becoming a citizen, birth or naturalization, and in both cases the person being made a citizen must be subject to the jurisditcion of the United States.

The *Slaughter House Cases,* supra, made it clear that this clause did refer only to the jurisdiction of the United States and did not require subjection to the jurisdiction of a state. 16 Wall. at 73-74.

A more recent Supreme Court decision has analyzed the clause under consideration and after mentioning *Elk,* concluded that the clause is equivalent of the words "within the limits and under the jurisdiction of the United States". *U.S. v. Wong Kim Ark,* 169 U.S. 649, 687 (1898). The court reasoned in that case that this interpretation was correct due to a change in wording which was implemented when the Civil Rights Act of 1866 was reenacted as the Fourteenth Amendment. The wording was changed from "not subject to any foreign power" to the curent wording. By statutory proclamation, it is clear that Congress at the time of *Elk* and *Wong Kim Ark* did not regard the Indian tribes as foreign powers. 16 Stat. 566 provided that "no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty ***" 25 U.S.C. § 71 (1871).

The issue here is not so much whether the enactment of 8 U.S.C. § 1401 by the Congress was wise or good public

policy, but rather whether Congress had the constitutional authority to so legislate. *See U.S. v. Rogers,* 4 How. 567 at 572.

When a party is subject to the plenary power of another party, that first party is subject to the jurisdiction (complete and immediate) of the second party. Congress' power over the Indian tribes is plenary. *Worcester v. Georgia,* 6 Pet. 515 (1834); *McClanaghan v. Arizona State Tax Comm.,* 411 U.S. 164 (1973). *See also, Morton v. Mancari,* 94 S.Ct. 2474 (1974).

The phrase "not taxed" as used in the second section of the Fourteenth Amendment is an historical anomoly which is of no relevance today. From an historical viewpoint, it is clear that this phrase was synonymous with the granting of citizenship. Inferring from the wording of the Amendment, one can presume that an Indian who was taxed was eligible to be counted for representation purposes. Therefore, taxation was the equivalent to being considered a citizen.

Nowhere does the Constitution define the requirements necessary for citizenship. *See Wong Kim Ark,* supra at 459. The granting of citizenship by Congress in 8 U.S.C. § 1401 recognizes that the Indian now is subject to federal jurisdiction and many federal taxes. It is much too strict a reading of the Constitution to require subjection to state taxes before the citizenship may be granted.

The court in *Elk* recognized the trend of national legislation toward the education and civilization of the Indians in an attempt to prepare them for citizenship. *Elk, supra* at 106-107. The court further recognized that it would take an act of Congress to implement this goal. *Id.* at 103. The Congress did just this when it enacted 8 U.S.C. § 1401 (a)(2).

Since Congress did act constitutionally in granting citizenship to the reservation Indians, and since, under the Fourteenth Amendment, the Indians are also citizens of Arizona, and since the Arizona Constitution allows the Indians to vote, the defendants' equal protection and due process arguments appear to be premature for adjudication.

Defendants assert that due to the Indian Civil Rights Act, 25 U.S.C. § 1322(a), the state may assume jurisdiction over the Indian tribes only if the tribe consents. Defendants contend that due to their preferred status, the Indians would never consent.

Defendants ignore the fact that the State of Arizona could have unilaterally assumed jurisdiction over the tribe at any time between 1953 and 1968 at which time the act was passed. 67 Stat. 590 (1953) granted the states authority to assume jurisdiction even though the state's enabling statute was to the contrary. The court in *Williams v. Lee,* 358 U.S. 217 (1959), was probably correct when the court assumed that the people of Arizona concluded that the burdens accompanying this assumption might be considerable. *Id.* at pp. 222-23.

From the record presently before us, it is clear that a malapportionment of supervisorial districts is present. It therefore appears that Apache County Arizona must be redistricted so that the apportionment may conform to the standards dictated in *Baker v. Carr,* 369 U.S. 186 (1962); and *Avery v. Midland County,* 390 U.S. 474 (1968).

WHEREFORE, IT IS ORDERED ADJUDGED AND DECREED that the plaintiffs' Motions for Summary Judgment are granted and the defendants' Motions are denied.

DATED this 30th day of June, 1975.

JUDGE TRASK, Circuit Judge
JUDGE CRAIG, District Judge
JUDGE COPPLE, Circuit Judge

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In the United States District Court for the District of Arizona

Filed February 19, 1976

Leslie E. Goodluck, et al., Plaintiffs, vs. Apache County et al., Defendants.	CIV No. 73-626-PCT-WEC
United States of America, Plaintiff, vs. State of Arizona, et al., Defendants.	74-50-PCT-WEC

ORDER

The Court has considered the defendants' motion for a rehearing, memorandum in support thereof, and response of the plaintiffs in the consolidated cases captioned above.

It is hereby ORDERED that the defendants motion for a rehearing is denied.

Dated: 19 February 1976

Judge Trask, Circuit Judge
Judge Craig, District Judge
Judge Copple, District Judge

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Roger A. Schwartz
Attorneys
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Department of Justice
Washington, D. C. 20530

In the United States District Court for the District of Arizona

Filed February 19, 1976

Leslie E. Goodluck, et al., Plaintiffs, v. Apache County, et al., Defendants.	CIV 73-626 PCT (WEC)
United States of America, Plaintiff, v. State of Arizona, et al., Defendants.	CIV. 74-50 PCT (WEC)

ORDER

On September 16, 1975, this Court, sitting as a three judge court pursuant to 28 U.S.C. §§ 2281, 2282, and 2284, issued its Opinion and Judgment in the consolidated cases captioned above. For the reasons stated therein;

IT IS ORDERED, ADJUDGED AND DECREED that:

1. The plaintiffs' motions for summary judgment are granted. The defendants' motions for summary judgment, counterclaims against the plaintiffs, and all other claims against the plaintiffs are denied;

2. The defendants, Apache County and the individual members of the Board of Supervisors, shall adopt a plan for reapportionment of the County's supervisorial districts which will conform to the standards set out in *Baker v.*

Carr, 369 U.S. 186 (1962); *Avery v. Midland County,* 390 U.S. 474 (1968); the Fourteenth and Fifteenth Amendments to the Constitution of the United States; the Voting Rights Acts of 1965, as amended, 42 U.S.C. § 1973 *et seq.;* and 42 U.S.C. §§ 1971(a)(1) and (a)(2)A;

3. Within forty-five (45) days from the entry of this Order, the defendants shall submit the adopted reapportionment plan to the Attorney General of the United States, or to the United States District Court for the District of Columbia, pursuant to the provisions of Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c.

4. Should the Attorney General or the District Court for the District of Columbia determine, pursuant to the provisions of Section 5 of the Voting Rights Acts, that the adopted reapportionment plan does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race, the plan shall be submitted to the District Court for the District of Arizona. The District Court for the District of Arizona shall determine whether the plan complies with the provisions of this Court's Order, Opinion, and Judgment and, if the plan does so comply, the Court shall order its implementation.

5. Upon submission of the defendants' reapportionment plan, the District Court for the District of Arizona shall also consider whether any additional affirmative relief is required to fully implement this Court's Order, Opinion and Judgment.

6. No further issues require a three judge court and, pursuant to 28 U.S.C. §§ 2281, 2282, and 2284, the consolidated cases are remanded to a single judge for such action which is not inconsistent with this Court's Order, Opinion and Judgment.

7. Any party may move the District Court for the District of Arizona to dismiss the consolidated actions at any time following the expiration of eighteen (18) months from the entry of this Order if, at such time, the Court's Order, Opinion and Judgment has been fully implemented. Provided, however, that any other party shall have thirty (30) days in which to respond to the motion to dismiss.

8. The plaintiffs shall recover of the defendants their taxable cost.

9. The District Court for the District of Arizona shall retain jurisdiction of the consolidated cases for all purposes.

Dated this 19th day of February, 1976.

Judge Trask, Circuit Judge
Judge Craig, District Judge
Judge Copple, District Judge

In the United States District Court
for the District of Arizona

Filed March 22, 1976

Leslie E. Goodluck, et al., Plaintiffs, v. Apache County, et al., Defendants.	CIV. 73-626 PCT (WEC)
United States of America, Plaintiff, v. State of Arizona, et al., Defendants.	CIV. 74-50 PCT (WEC)

SUPPLEMENTAL POST-TRIAL ORDER

On September 16, 1975, this Court, sitting as a three judge court pursuant to 28 U.S.C. §§ 2281, 2282, and 2284, issued its Opinion and Judgment in the consolidated cases captioned above. On February 19, 1976, this Court issued an Order implementing the provisions of its Opinion and Judgment of September 16, 1975.

IT IS ORDERED, ADJUDGED AND DECREED THAT:

1. Defendants' Motion for Injunction or Stay Pending Appeal from Judgment and Order is hereby denied.

2. Paragraphs 3 and 4 of this Court's Order of February 19, 1976, are amended and modified, *nunc pro tunc,* to read as follows:

> "3. On or before April 23, 1976, the defendants shall submit the adopted reapportionment plan to this Court which shall determine whether the plan complies with the standards set forth in paragraph 2 of this Order.
>
> "4. Defendants shall, at the same time they file the plan with this Court, serve copies of the plan upon all other parties in this case, together with the demographic and other statistics upon which the plan is based. The parties shall have twenty (20) days from date of service of the plan to file with this Court any comments, responses, or objections thereto. This Court reserves the authority to adopt defendants' plan as submitted, to alter, amend, or modify defendants' plan, to adopt any plan proposed by any one of the other parties, or to fashion and adopt its own plan."

3. Except as herein above amended and modified *nunc pro tunc,* this Court's Order of February 19, 1976, remains in full force and effect.

DATED this 22nd day of March, 1976.

Judge Trask, Circuit Judge

Judge Craig, District Judge

Judge Copple, District Judge

Appendix B

Filed March 4, 1976

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In the United States District Court for the District of Arizona

United States of America, Plaintiff, vs. State of Arizona; Apache County; and Margaret Lee, Tom Shirley, Larry Stradling, and Arthur N. Lee as Clerk and Members of the Apache County Board of Supervisors, Defendants.	NO. CIV. 74-50-PCT
Leslie E. Goodluck, Kenneth Chee, Steven Ashley, Sr., Stanley E. Ashley, and Anderson Yazzie, Plaintiffs, vs. Apache County; and Margaret Lee, Arthur N. Lee, Larry Stradling, James A. McDonald and Tom Shirley, individually and as Clerk and members of the Apache County Board of Supervisors, Defendants,	NO. CIV. 73-626-PCT

vs.

Edward Levi, as Attorney General of the United States; Raul Castro, as Governor of the State of Arizona; Bruce Babbitt, as Attorney General of Arizona; Virgie Heap, as Apache County Recorder; Lavine Porter and Florence Paisano, in their capacities as Justices of the Peace in Apache County, Additional Defendants on Counterclaim.

NOTICE OF APPEAL

Notice is hereby given that the defendants Apache County, and Margaret Lee, Arthur N. Lee, Larry Stradling, and Tom Shirley as Clerk and members of the Apache County Board of Supervisors respectively and Margaret Lee, Arthur N. Lee, Larry Stradling and James A. McDonald individually, as above named hereby appeal to the Supreme Court of the United States from the 3 judge district court Opinion and Judgment entered September 16, 1975 and subsequent Order denying defendants' Motion for Rehearing and Order Finalizing Judgment filed February 19, 1976 and the whole thereof.

The statutes under which this appeal to the United States Supreme Court is taken are 28 U.S.C. § 1253 and 42 U.S.C. § 1971(g).

Respectfully submitted this 2 day of March, 1976.

PLATT & PLATT
By MITCHEL D. PLATT
Attorneys for Defendants

I hereby certify that a true copy of the foregoing was mailed to all other counsel of record designated below this 2 day of March, 1976.

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Appendix C

8 U.S.C. § 1401:

(a) The following shall be nationals and citizens of the United States at birth:

(1) a person born in the United States, and subject to the jurisdiction thereof;

(2) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: *Provided,* That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property;

(3) a person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had a residence in the United States or one of its outlying possessions, prior to the birth of such person;

(4) a person born outside of the United States and its outlying possessions of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year prior to the birth of such person, and the other of whom is a national, but not a citizen of the United States;

(5) a person born in an outlying possession of the United States of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year at any time prior to the birth of such person;

(6) a person of unknown parentage found in the United States while under the age of five years, until shown, prior to his attaining the age of twenty-one years, not to have been born in the United States;

(7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years: *Provided,* That any periods of honorable service in the Armed Forces of the United States, or periods of employment with the United States Government or with an international organization as that term is defined in section 288 of Title 22 by such citizen parent, is physically present abroad as the dependent unmarried son or daughter and a member of the household of a person (A) honorably serving with the Armed Forces of the United States, or (B) employed by the United States Government or an international organization as defined in section 288 of Title 22, may be included in order to satisfy the physical-presence requirement of this paragraph. This proviso shall be applicable to persons born on or after December 24, 1952, to the same extent as if it had become effective in its present form on that date.

(b) Any person who is a national and citizen of the United States under paragraph (7) of subsection (a) of this section shall lose his nationality and citizenship unless—(1) he shall come to the United States and be continuously physically present therein for a

period of not less than two years between the ages of fourteen years and twenty-eight years; or (2) the alien parent is naturalized while the child is under the age of eighteen years and the child begins to reside permanently in the United States while under the age of eighteen years. In the administration of this subsection absences from the United States of less than sixty days in the aggregate during the period for which continuous physical presence in the United States is required shall not break the continuity of such physical presence.

(c) Subsection (b) of this section shall apply to a person born abroad subsequent to May 24, 1934; *Provided, however,* That nothing contained in this subsection shall be construed to alter or affect the citizenship of any person born abroad subsequent to May 24, 1934, who, prior to the effective date of this chapter, has taken up a residence in the United States before attaining the age of sixteen years, and thereafter, whether before or after the effective date of this chapter, complies or shall comply with the residence requirements for retention of citizenship specified in subsections (g) and (h) of section 201 of the Nationality Act of 1940, as amended.

(d) Nothing contained in subsection (b) of this section, as amended, shall be construed to alter or affect the citizenship of any person who has come to the United States prior to October 27, 1972, and who, whether before or after October 27, 1972, immediately following such coming complies or shall comply with the physical presence requirements for retention of citizenship specified in subsection (b) of this section prior to its amendment and the repeal of section 1401b of this title.

As amended Oct. 27, 1972, Pub.L. 92-584, §§ 1, 3, 86 Stat. 1289.

A.R.S. § 16-101. Qualifications of registrant

Every resident of the state is qualified to register to vote if he:

1. Is a citizen of the United States.

2. Will be eighteen years or more of age prior to the regular general election next following his registration.

3. Will have been a resident of the state fifty days next preceding the election, except as provided in §§ 16-171 and 16-172.

4. Is able to write his name or make his mark, unless prevented from so doing by physical disability.

5. Has not been convicted of treason or a felony, unless restored to civil rights, is not under guardianship, non compos mentis or insane. As amended Laws 1970, Ch. 151, § 1; Laws 1972, Ch. 146, § 23; Laws 1972, Ch. 218, § 1, eff. May 24, 1972; Laws 1973, Ch. 183, § 7.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1572

APACHE COUNTY, ET AL., *Appellants,*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees.*

Appeal from the United States District Court for the District of Arizona

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MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

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Appellees Leslie E. Goodluck, Kenneth Chee, Steven Ashley, Sr., Stanley E. Ashley, and Anderson Yazzie respectfully move this Court to dismiss this appeal, on the ground that the claimed violations of Constitutional rights are hypothetical, speculative, and thus premature for adjudication.

In the alternative, appellees move the Court to affirm the judgment of the court below on the grounds that: (1) it is manifest that the questions on which the decision of the cause depends are so insubstantial as not to need further argument; (2) the decision below is obviously correct.

STATEMENT OF THE CASE

Plaintiffs Goodluck, et al., are five residents of northern Apache County, Arizona, who filed one of two actions later consolidated seeking reapportionment of the Apache County Board of Supervisors on the basis of the one-man, one-vote principle.[1] The United States later filed an action to the same end which added an additional claim of racial discrimination.

The facts relevant to the reapportionment claims are not in dispute. Apache County is a political subdivision of the State of Arizona. The Board of Supervisors is its governing body and exercises general governmental authority in the county. There are three supervisors, elected from geographic districts within the county. The Board's authority includes defining of the territorial limits of supervisorial districts within the county. By statute districts are required to have substantially equal population. Ariz.Rev.Stat. § 11-212. According to the 1970 federal census, the approximate population of Apache County's three districts is: District 1, 1700; District 2, 3900; District 3, 26,700. District 3 is entirely within the Navajo Indian Reservation. The approximate Indian population of the three districts is: District 1, 70; District 2, 300; District 3, 23,600.

Defendants in these cases are Apache County and its officials. In both cases they filed counterclaims and brought in the State of Arizona and various state

[1] The Jurisdictional Statement alleges that these five plaintiffs are "Navajo Reservation Indians." While this allegation is irrelevant to any claim made in these cases, the fact is that four of the plaintiffs are Navajo and one is non-Indian. Plaintiffs' Answers to Defendants' Interrogatories.

and federal officials as additional defendants. The counterclaims assert that allowing reservation Indians to vote or be counted as part of the county's population for apportionment violates the Fifth and Fourteenth Amendments; that the federal laws making Indians citizens are unconstitutional; and that the Arizona laws interpreted by the officers and courts of the state to allow Indians to vote and be counted for apportionment are unconstitutional. Injunctive relief was sought and, pursuant to 28 U.S.C. §§ 2281-2282, a three-judge court was convened. That court denied injunctive relief on the counterclaim, and defendants/counterclaimants now appeal from that denial.

Appellants moved the court below for an injunction or stay pending appeal; this motion was denied. A similar motion to Justice Rehnquist was also denied. The jurisdictional statement was received by counsel for appellees Goodluck, et al., on April 23, 1976, and this appeal was docketed on April 27, 1976.

ARGUMENT

I. Introduction

Appellants ask this Court to enjoin as unconstitutional the federal statutes making Indians citizens and the Arizona laws allowing them to vote and be counted as residents of the state for apportionment purposes. Despite seven headings, the arguments made raise essentially two points:

(1) The federal laws making Indians citizens violate the Fourteenth Amendment;

(2) The special status of reservation Indians within the federal system makes it unconstitutional

for Indians to vote or to be counted for apportionment of the Board of Supervisors.

II. Indians Are Citizens

Appellants urge that 8 U.S.C. §1401(a)(2) is an unconstitutional attempt to confer citizenship on Indians born in the United States. This oversimplifies the question, since by the time of enactment of the original version of 8 U.S.C. §1401(a)(2) in 1924, an estimated two-thirds of the Indians in the United States were already citizens pursuant to other federal statutes. F. Cohen, *Handbook of Federal Indian Law,* page 153 (1942 ed., U.N.Mex. Reprint 1971).

Appellants argue that the statutes naturalizing American Indians violate the Fourteenth Amendment. Appellants rely on that portion of the amendment granting citizenship, Section 1, which was construed not to include an Indian born before 1871 in *Elk* v. *Wilkins,* 112 U.S. 94 (1884). In *Elk* the Court ruled that Mr. Elk was not born "subject to the jurisdiction" of the United States as specified in the Fourteenth Amendment, Section 1.

In *Elk* the Court had no occasion to consider the status of Indians born in the United States after 1871, when Congress enacted 16 Stat. 566, now 25 U.S.C. §71. This statute ended treaty-making with Indian tribes, which were "no longer regarded as sovereign nations," *DeCoteau* v. *District County Court,* 420 U.S. 425 (1975). Court decisions since 1871 establish that Indians and Indian tribes are generally subject to federal law in common with other citizens. *Federal Power Com'n* v. *Tuscarora Indian Nation,* 362 U.S. 99, 115-118 (1960). That decision expressly confined *Elk* v. *Wilkins, supra,* to history: "However

that may have been, it is now well settled by many decisions of this Court that a general statute in terms applying to all citizens includes Indians and their property interests." 362 U.S. at 116. Thus an Indian born in the United States since 1871 comes within the terms of the Fourteenth Amendment, Section 1.

A second basis for the *Elk* decision relied on the Fourteenth Amendment, Section 2, which established apportionment for the United States House of Representatives according to population "excluding Indians not taxed." The Court in *Elk* reasoned that the Congress in drafting and approving the Fourteenth Amendment did not intend to grant citizenship in Section 1 to Indians excluded from apportionment in Section 2. As noted above, Indians are now subject generally to all federal taxes, and in theory this rule dates from 1871. However, the court decisions establishing this rule date only from the 1930's, by which time all Indians had been naturalized by statute. *Federal Power Com'n* v. *Tuscarora Indian Nation, supra,* 362 U.S. at 116-117. For this reason the courts have never considered the effect of 25 U.S.C. §71 on the *Elk* v. *Wilkins* rationale.

In the court below appellants argued that Indians are not "subject to the jurisdiction" of the United States in any respect, state or federal. The Jurisdictional Statement does not repeat this error, but the suggestion remains by inference, since appellants rely on a student note from the *Arizona Law Review,* Note, 15 Ariz.L.Rev. 973 (1973). This note clearly assumes the erroneous premise that the laws of the United States do not apply to Indians. 15 Ariz.L.Rev. at 997.

Appellants' argument now focuses on the fact that Indians while on reservations are not subject to many state laws. This point is discussed in more detail in the next section; appellants also urge it here, apparently claiming that:

(A) The Fourteenth Amendment not only granted citizenship to former slaves, it affirmatively excluded from citizenship anyone not "subject to the jurisdiction" of the United States; and

(B) "Subject to the jurisdiction" of the United States means subject to all state laws as well as federal; and

(C) "Indians not taxed" means Indians exempt from state property taxes, even if they pay other taxes; and

(D) Citizenship requires full state jurisdiction as a matter of Constitutional law.

A. The Fourteenth Amendment Does Not Limit Congress' Power to Naturalize

There is no authority for the first proposition above. The Constitutional power over citizenship was originally totally within Congress' authority, Constitution, art. 1, sec. 8, cl. 4. The Fourteenth Amendment eliminated Congress' power to deny citizenship to anyone born in the United States and subject to its jurisdiction, and the amendment denied to the states any authority over citizenship. This Court summarized the latter point in the *Slaughter-House Cases,* 83 U.S. (16 Wall.) 36 (1873). But there is no authority for the proposition that the Fourteenth Amendment reduced Congress' power to naturalize. *Elk* v. *Wilkins,*

supra, is not such authority, since the Court in *Elk* expressly recognizes that Congress can naturalize Indians. 112 U.S. at 101.

B. Indians Are "Subject to the Jurisdiction" of the United States

As the court below noted, this Court in the *Slaughter-House Cases, supra,* 83 U.S. (16 Wall.) at 73-74, made it clear that the phrase "subject to the jurisdiction thereof" in the Fourteenth Amendment, Section 1, refers only to the jurisdiction of the federal government and did not require subjection to state jurisdiction.

C. There No Longer Are "Indians Not Taxed"

The phrase "Indians not taxed" in the Fourteenth Amendment, Section 2, is no longer literally true as to any Indians, since most federal taxes are collected from Indians, and a few state taxes are as well even on reservations. There is no basis in the literal phrase, nor support in any authority, to give the phrase the meaning appellants assert.

D. Citizenship Is Compatible with Tribal Existence

The proposition that citizenship and continued federal guardianship over Indians are incompatible once had support in a case cited and relied upon by appellants. *In re Heff,* 197 U.S. 488 (1905). However, that case was expressly overruled by *United States* v. *Nice,* 241 U.S. 591, 598 (1916), where the Court stated:

> Citizenship is not incompatible with tribal existence or continued guardianship and so may be

> conferred without completely emancipating the Indians, or placing them beyond the reach of Congressional regulations adopted for their protection.

See also Creek County v. *Seber,* 318 U.S. 705, 718 (1943); *Tiger* v. *Western Investment Co.,* 221 U.S. 286, 310-313 (1911).

Finally, the Constitutionality of the particular statute attacked by appellants, 8 U.S.C. § 1401(a)(2), has been repeatedly upheld by the lower courts. *Williams* v. *United States,* 406 F.2d 704 (9th Cir. 1969), *cert. denied,* 394 U.S. 959; *Albany* v. *United States,* 152 F.2d 266 (6th Cir. 1945); *Ex parte Green,* 123 F.2d 862 (2d Cir. 1941), *cert. denied,* 316 U.S. 668; *United States* v. *Neptune,* 337 F.Supp. 1028 (D.Conn. 1972); *Totus* v. *United States,* 39 F.Supp. 7 (E.D. Wash. 1941).

For these reasons, appellants' contention that the laws naturalizing Indians are unconstitutional is without merit. Furthermore, Indians born after 1871 are citizens by birth under the Fourteenth Amendment, Section 1.

III. The Special Status of Indians Does Not Render Unconstitutional Indian Participation in County Government

The remaining contentions of appellants all derive from the special status of Indians within the federal system. Unlike other citizens, reservation Indians are subject to the plenary control of Congress, rather than the divided authority of Congress and the States. *Lone Wolf* v. *Hitchcock,* 187 U.S. 553 (1903). As a result, Indians while on reservations are subject to state law only when Congress so provides, or where

there is no interference with federal policies including the important policy of tribal self-government. Appellants thus contend that Indians will participate in the making of laws to which they are not subject and will "destroy" others by abuse of the taxing power.

In summary, appellees' responses are:

(A) No actual abuse is presented on this record; the complaint is premature at best.

(B) Appellants do not present an accurate picture of Arizona County government; reservation Indians do have a significant stake in it.

(C) Indians are residents of the state.

(D) Some of appellants' more dramatic speculations are not the law.

A. Appellants' Contentions Are Premature

To reach some of the hypothetical situations suggested by appellants, one must assume that in addition to the Indian population majority, there would be an Indian majority of registered voters; an Indian majority of actual voters; an Indian majority that is unified enough to elect its own choices; and the Indians' choices would act unlawfully or improperly. Present facts do not support these speculations. Indians have voted in Arizona since 1948. *Harrison* v. *Laveen,* 67 Ariz. 337, 196 P.2d 456 (1948). Yet in 28 years not one Indian has been elected to county-wide office in Apache County. The only Indian official in the county is appellant Tom Shirley, the supervisor from District 3. The county opposed his taking office in the Arizona courts, which ruled against the county, rejecting many of the same arguments now being

made to this Court. *Shirley* v. *Superior Court,* 109 Ariz. 510, 513 P.2d 939 (1973), *cert. denied,* 415 U.S. 917.

Furthermore, since county governments are under state control, state remedies may well prove adequate should any of the extreme fears of appellants come to pass.

For these reasons resort to the federal courts to solve speculative and hypothetical problems is premature. To the extent the present appeal is based on such grounds, it should be dismissed.

B. Indians Have a Stake in County Government as It Actually Functions in Arizona.

Appellants' speculations imply greater powers to Arizona county governments than exist. Arizona counties have only those powers expressly allowed by the legislature. *Hart* v. *Bayless Inv. & Trading Co.,* 86 Ariz. 379, 346 P.2d 1101 (1959). The most persistent plaint of appellants, possible abuse of the taxing power, is a chimera. The only tax levied by the Board of Supervisors that is discretionary in amount is the general county levy on taxable property, yet this tax is by statute limited to $2 per $100 of assessed valuation (20 mils). Ariz.Rev.Stat. § 11-251(12). While most Indian property is exempt from this tax,[2] so is the bulk of the off-reservation part of Apache County, which is national forest, public domain, and national parkland. The overwhelming proportion of taxable

[2] The exceptions include certain mineral production, 25 U.S.C. §§ 398, 398c, Industrial Uranium Co. v. State Tax Com'n, 95 Ariz. 130, 387 P.2d 1013 (1963); former allotments, 25 U.S.C. § 349; and non-Indian interests in Indian property.

property in the county is mining, utilities, and railroad property, located both on and off the two Indian reservations in the county.

The actual functions of county government in Arizona are typical of those elsewhere: education, law and order, roads and highways, and the conduct of federal, state and local elections. The majority of Arizona Indians attend state-controlled public schools, which are lawfully established on the reservations. *Indian Oasis School District No. 40* v. *Zambrano,* 22 Ariz.App. 201, 526 P.2d 408 (1974); *cf., Prince* v. *Board of Education,* 88 N.M. 548, 543 P.2d 1176 (1975). In the field of roads and highways, the state gasoline tax is collected from reservation Indians (apparently pursuant to 4 U.S.C. § 104), and the Board of Supervisors controls the spending of part of the taxes collected. Ariz.Rev.Stat. § 28-1502. Other local concerns are placed under state law authority by 25 U.S.C. § 231. The Indians' status on the reservation does reduce (though does not eliminate) their interest and involvement in the county's courts and sheriff. But overall, they have a significant interest in county government.

In two cases this Court has struck down as unconstitutional state attempts to disenfranchise residents of other kinds of federal enclaves. *Evans* v. *Cornman,* 398 U.S. 419 (1970); *Carrington* v. *Rash,* 380 U.S. 89 (1965). In other cases the Court has struck down laws attempting to confine voting to owners of taxable property. *City of Phoenix* v. *Kolodziejski,* 399 U.S. 204 (1970); *Cipriano* v. *City of Houma,* 395 U.S. 701 (1969); *Kramer* v. *Union Free School District,* 395 U.S. 621 (1969). By contrast Arizona has not sought

to limit the franchise by statute; appellants seek to do so by court action to invalidate state statutes.

C. Indians Are Residents

Appellants contend that reservation Indians whose reservations are physically within the boundaries of Arizona are not residents of Arizona. They argue that state court service of process will not reach a reservation Indian and equate the reach of process with residence. This argument borders on the frivolous.

In the first place the Arizona courts have ruled contrary to its premise. In *Francisco* v. *State,* 25 Ariz. App. 164, 541 P.2d 955 (1975), the court ruled that state civil service of process on an Indian on the reservation is valid. *See also State Securities, Inc.* v. *Anderson,* 84 N.M. 629, 506 P.2d 786 (1973). The cases cited by appellants are inapposite. *Martin* v. *Denver Juvenile Court,* 493 P.2d 1093 (Colo. 1972), was decided on a point of state law, not on the basis of lack of state power. *Annis* v. *Dewey County Bank,* 335 F.Supp. 133 (D.S.D. 1971), involved seizure of property, not service.

Arizona courts have repeatedly ruled that Indians are residents of the state and entitled to the benefits of residence: *Shirley* v. *Superior Court,* 109 Ariz. 510, 513 P.2d 939 (1973), *cert. denied,* 415 U.S. 917; *Harrison* v. *Laveen,* 67 Ariz. 337, 196 P.2d 456 (1948); *Bradley* v. *Arizona Corp. Com'n,* 60 Ariz. 508, 141 P.2d 524 (1943); *Bogay* v. *Sawtelle,* 53 Ariz. 304, 88 P.2d 999 (1939); *Dennison* v. *State,* 34 Ariz. 144, 268 P. 617 (1928).

To the extent that residence is a state law question, review in this Court is not proper. However, this

Court has also repeatedly ruled that Indian reservations are physically part of the states in which they lie. *Langford* v. *Monteith,* 102 U.S. (12 Otto) 145 (1880), *United States* v. *McBratney,* 104 U.S. 621 (1882); *Utah & Northern Ry. Co.* v. *Fisher,* 116 U.S. 28 (1885); *Thomas* v. *Gay,* 169 U.S. 264 (1898); *Wagoner* v. *Evans,* 170 U.S. 588 (1898); *Montana Catholic Missions* v. *Missoula County,* 200 U.S. 118 (1906); *see also Kahn* v. *Arizona Tax Com'n,* 16 Ariz. App. 17, 490 P.2d 846 (1971), *appeal dismissed,* 411 U.S. 941 (1973).

D. The State Has Sufficient Authority for the Protection of Its Offices

Appellants propose a number of hypotheticals of Indian officeholders engaging in wrongdoing with no state authority to protect state and county interests. While it is not possible to respond authoritatively to all of these, some important observations can be made.

Indians off of reservations are, of course, normally subject to all state laws. *Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145, 148-149 (1973). And in Arizona, state civil process at least would reach onto the reservation for such an event. *Francisco* v. *State, supra.* In *Indian Oasis School District No. 40* v. *Zambrano,* 22 Ariz.App. 201, 526 P.2d 408 (1974), Indian school board members were held subject to state court jurisdiction for on-reservation official acts. The premise of these cases is that Indian reservation self-government is the area pre-empted from state authority, and the matters at issue in these cases did not infringe upon tribal self-government. The same premise was relied upon by this Court in *Moe* v. *Confederated Salish and Kootenai Tribes,* —— U.S. —— (Nos. 74-1656 and

75-70; 44 U.S.L.W. 4535, Apr. 27, 1976), in which the Court sustained collection of a cigarette tax from Indian sellers on the reservation, where the burden of the tax was on non-Indian buyers.

Also, at the least many state criminal standards are applicable to reservation Indians through the Assimilative Crimes Act, 18 U.S.C. § 13, as applied by 18 U.S.C. § 1152. *See, e.g., United States* v. *Sosseur,* 181 F.2d 873 (7th Cir. 1950).[3]

For these reasons, the state has adequate protections for its interests.

CONCLUSION

For the reasons stated, this Court is respectfully requested to dismiss the Appeal or to affirm the judgment of the court below.

Respectfully submitted,

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[3] In Evans v. Cornman, *supra,* federal court jurisdiction over crimes was advanced as a reason to sustain a state law disenfranchising federal enclave residents, but this Court rejected the argument, 398 U.S. at 424.

No. 75-1572

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v.

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MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16(1)(a) of the Rules of this Court, the United States moves the Court to dismiss this appeal or, alternatively, to affirm summarily.

OPINION BELOW

The opinion of the district court (J.S. App. 1-7) is not yet reported.

JURISDICTION

The opinion and judgment of the three-judge district court was filed on September 16, 1975. In two orders filed on February 19, 1976, the court denied appellants' motion for rehearing (J.S. App. 8) and

ordered its opinion and judgment implemented (*id.* at 9–11).[1] A notice of appeal was filed on March 4, 1976 (*id.* at 14–15), and the jurisdictional statement was filed on April 27, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1253 and 42 U.S.C. 1971(g).

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction over appellants' direct appeal from an order of a three-judge district court dismissing their counterclaim, without consideration of its merits, on the ground that it was premature.

2. Whether Sections 1 and 2 of the Fourteenth Amendment prohibit Congress from declaring reservation Indians to be citizens of the United States.

3. Whether the trial court correctly dismissed appellants' counterclaim, contending that they had been denied due process and equal protection, as premature for adjudication.

STATEMENT

This appeal arises from a judgment entered in two consolidated cases involving the apportionment of supervisorial districts in Apache County, Arizona.

1. Apache County is a political and geographic subdivision of the state of Arizona (J.S. App. 1). The county is governed by a Board of Supervisors with general governmental authority whose functions, by statute, include the task of dividing the county into

[1] Paragraphs 3 and 4 of the order implementing the judgment were amended, *nunc pro tunc*, in a Supplemental Post-Trial Order filed March 22, 1976 (J.S. App. 12–13).

supervisorial districts (*ibid.*).[2] The county has been divided into three such districts, denominated District 1, District 2, and District 3 (*id.* at 1–2). Each is represented on the Board by one supervisor, and each of the three supervisors exercises one vote (*id.* at 2).

According to the 1970 United States census, District 1 has a population of approximately 1,700; District 2, 3,900; and District 3, 26,700 (*ibid.*). A substantial portion of District 3 is composed of land on

[2] Section 11-211(A) of the Arizona Revised Statutes (1974 Cum. Supp.) provides, in part:

"In each county having a population of less than two hundred thousand as determined by the latest United States decennial census, a board of supervisors shall consist of three members * * * who shall be qualified electors of their supervisorial district and who shall be elected at a general election at which the president of the United States is elected."

A.R.S. 11-212 provides:

"The board of supervisors shall meet at the county seat on the first Monday in April next preceding a general election in which the president of the United States is elected, and divide the county into three or five supervisorial districts as provided in this article, which shall be numbered respectively, districts one, two and three or districts one, two, three, four and five. The board shall define the boundaries and limits of each district and make such division equal or as nearly equal in population as is practicable."

A.R.S. 11-213(A) provides, in part:

"At the general election for state and county officers, one supervisor shall be elected from each district from among those nominated at the preceding primary election. They shall be nominated and elected by the qualified electors of their respective districts."

The powers and duties of the Board of Supervisors are enumerated in A.R.S. 11-251 *et seq.* These include the authority to "[e]stablish, abolish and change election precincts, appoint inspectors and judges of elections, canvass election returns, declare the result and issue certificates thereof." A.R.S. 11-251(3).

the Navajo Indian Reservation, and 23,600 of the 26,700 persons residing within the boundaries of District 3 are Indians (*ibid.*). Of the 3,900 persons residing within District 2, 300 are Indians; and of the 1,700 in District 1, 70 are Indians (*ibid.*).[3] Only non-Indians have been counted in the apportionment of the supervisorial districts (J.S. 7).

2. On October 15, 1973, five of the appellees herein, Navajo Tribal Indians[4] residing within the territorial limits of District 3, filed a complaint in the United States District Court for the District of Arizona, against Apache County, and the members and clerk of its Board of Supervisors. The complaint alleged that "[t]he acts of defendants in establishing the supervisorial districts of Apache County debase the value of plaintiffs' votes in violation of their rights under the Fourteenth Amendment and under 42 U.S.C. §§ 1981 and 1983" (Complaint at 2).[5] Plaintiffs sought a declaration "that the present Supervisorial Districts of Apache County are unlawful" (*id.* at 3), and an injunction directing the development and immediate implementation of "a redistricting plan dividing Apache County into Supervisorial Districts of substantially equal population" (*id.* at 2–3).

[3] The district court did not distinguish between reservation Indians and non-reservation Indians in these figures.

[4] The other parties disagree over whether all five of the plaintiffs in the first suit filed are Navajo Reservation Indians (compare J.S. 7 with Motion to Dismiss or Affirm of Appellees Goodluck, *et al.* at 2 & n. 1), but resolution of that disagreement is unnecessary for disposition of this appeal.

[5] We are lodging, with the Clerk, copies of this complaint and all other pleadings in both cases.

In their Answer and Counterclaim, the appellants contended, *inter alia,* that "United States and Arizona citizenship is a prerequisite to becoming a qualified voter and consequently to be counted among the population upon which supervisorial apportionment is founded" (Answer and Counterclaim at 3);[6] that neither the plaintiffs nor any Navajo Reservation Indians are citizens under the Fourteenth Amendment or residents of Apache County (*ibid.*); and that 8 U.S.C. 1401(a)(2) and A.R.S. 16–101 (1975)[7] are unconstitutional insofar as they purport, respectively, to make the private appellees citizens, or allow them to vote and be counted as part of the population for the purpose of apportioning Apache County supervisorial districts (*id.* at 3, 5).

Additionally, appellants asserted that, since most of the people in District 3 are reservation Indians and thereby not subject to the same responsibilities and penalties as either non-Indians or Indians residing elsewhere (*id.* at 3, par. 2), permitting them to vote or be counted for apportionment purposes debases the

[6] The district court did not discuss the language of Section 11–212, Arizona Revised Statutes, providing that supervisorial districts be "equal or as nearly equal in *population* as is practicable" (emphasis added). That provision does not seem to require that persons be voters in order to be counted for apportionment purposes, and plaintiffs, therefore, may be entitled to reapportionment whether or not they may vote. However, plaintiffs in both cases presumably were concerned not only that Indians be counted, but that qualified Indians be permitted to vote, and the district court properly addressed the question whether Indians are entitled to vote in the reapportioned districts.

[7] These statutes are reproduced at J.S. App. 17–20.

vote of non-Indians and subjects them to potential deprivations of equal protection and due process (*id.* at 4–5, pars. 5–8, 10). Accordingly, invoking 42 U.S.C. 1981–1983, appellants "counterclaimed" in their individual capacities for a declaratory judgment that, to the extent that they give reservation Indians a right to vote, 8 U.S.C. 1401(a)(2) and A.R.S. 16–101 are unconstitutional, and sought an injunction against their enforcement. In an amended counterclaim, filed January 21, 1974, appellants also requested injunctive relief against the Attorney General of the United States (Answer and Amended Counterclaim at 3) and various state and local officials having responsibilities in connection with registration of voters (*id.* at 3–4). Finally, appellants asked that a three-judge court be convened pursuant to 28 U.S.C. 2281 and 2282 (*id.* at 6).

3. On January 23, 1974, the United States instituted a second suit against the same appellants, alleging that the existing Apache County apportionment plan, and the 1972 election held pursuant to it, violated 42 U.S.C. 1971(a)(1), 1971(a)(2)(A), and 1973, and the Fourteenth and Fifteenth Amendments. This complaint sought an order requiring the appellants to reapportion the Apache County supervisorial districts without regard to race or color (U.S. Amended Complaint, at 4–5).

Appellants' answer to this complaint raised, as a defense, the same contentions raised by way of defense and counterclaim in the first suit and asked that the merits of these consolidated cases be heard and determined by the three-judge court already designated[8] (Defendants' Answer to U.S. Amended Complaint).

4. These cases were heard on cross-motions for summary judgment. On February 19, 1976, the district court granted the motions of the private appellees and the United States, denied appellants' motion, and dismissed their counterclaim. The court directed the members of the Board of Supervisors to reapportion Apache County's supervisorial districts in a manner consistent with the principle of one-person, one-vote (J.S. App. 9–10).

The court rejected appellants' contention that 8 U.S.C. 1401(a)(2) is unconstitutional insofar as it makes Indians citizens of the United States at birth (J.S. App. 3–6), and found appellants' equal protection and due process arguments "premature for adjudication" (J.S. App. 7).

Appellants' motions for a stay pending appeal were denied by the three-judge court and by Mr. Justice Rehnquist.

ARGUMENT

I

APPEAL DOES NOT LIE IN THIS COURT FROM A DECISION BY A THREE-JUDGE COURT THAT A CLAIM IS PREMATURE

The only basis for convening a three-judge court in this case was appellants' counterclaim for an injunction against the enforcement of the Act conferring citizenship on Indians (8 U.S.C. 1401(a)(2))

[8] A three-judge court had been designated to hear the suit filed by appellees Goodluck, *et al.* on April 8, 1974.

and Section 16–101, Arizona Revised Statutes, which sets forth the state requirements for qualified voters. Since the three-judge court effectively dismissed this claim on a finding that appellants' "equal protection and due process arguments appear to be premature for adjudication" (J.S. App. 7), an appeal properly lies only to the appropriate court of appeals. *MTM, Inc.* v. *Baxley,* 420 U.S. 799; *Gonzalez* v. *Automatic Employees Credit Union,* 419 U.S. 90. This direct appeal therefore should be dismissed.

A. NEITHER COMPLAINT IN THESE CASES REQUIRED THE CONVENING OF A THREE-JUDGE COURT

The initial suit filed by the private appellees, asking the county board of supervisors to reapportion supervisorial districts in conformity with the requirements of Arizona law,[9] did not require consideration by a three-judge district court, for no injunction was sought on grounds of the unconstitutionality of any law. To the contrary, appellees asked that state and federal laws be enforced to provide the requested relief. Similarly, the United States' suit for reapportionment under 42 U.S.C. 1971 and 1973, did not require a three-judge court.[10] While appellants did allege as an

[9] See A.R.S. 11–212, p. 3, n. 2, *supra.*

[10] Appellants are incorrect in their assertion that the three-judge court was "appropriate" under 42 U.S.C. 1971(g) (J.S. 3). That section permits Section 1971 actions to be heard by three-judge district courts only in those instances in which the Attorney General has explicitly requested the court to determine that the deprivation of rights alleged was or is pursuant to a "pattern or practice," as prescribed in 42 U.S.C. 1971(e). No such request or allegation appears in the United States' complaint.

affirmative defense that a judgment for the plaintiffs would deprive them of "Constitutional and Civil Rights," the raising of constitutional matters as a defense,[11] without any request for injunctive relief, is not an adequate basis for convening a three-judge court under 28 U.S.C. 2281 and 2282. Cf. *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144; *Mitchell* v. *Donovan,* 398 U.S. 427; *Goldstein* v. *Cox,* 396 U.S. 471; *Rockefeller* v. *Catholic Medical Center,* 397 U.S. 820. Thus, the jurisdiction of the three-judge court necessarily depended upon appellants' counterclaim.

B. THE DISTRICT COURT DID NOT CONSIDER THE MERITS OF THE COUNTERCLAIM BUT DISMISSED IT AS PREMATURE

The gravamen of appellants' counterclaim [12] is that participation in the political process by tribal In-

[11] Under Arizona law, the individual appellants have the responsibility for apportioning the supervisorial districts (see p. 3, n. 2, *supra*), and were named as defendants in both complaints for this very reason. For the same reason, however, injunctive relief on their counterclaim, if appropriate at all, would run in part against themselves. This anomaly demonstrates that the counterclaim was but an attempt to convert a defense of unconstitutionality into a predicate for a three-judge court.

[12] Appellants' counterclaim quite clearly did not state a claim against the private appellees, none of whom enforces any statutes. It is doubtful that joinder of additional parties (who are not plaintiffs in appellees' suit) can cure that defect. See, *e.g., United States* v. *Techno Fund, Inc.,* 270 F. Supp. 83, 85 (S.D. Ohio); 6 Wright and Miller, *Federal Practice and Procedure,* § 1435, p. 188 (1971 ed.). Appellants did not assert the counterclaim in the action brought by the United States. These questions were not raised in the district court, however.

dians,[13] because they are exempt from certain state taxes and enjoy special privileges by virtue of their unique historic status, is a denial of equal protection and due process to non-Indians. They argue that, should the Indians effectively control county government, they would be in a position to abuse their power to the detriment of non-Indians (J.S. 5, 17–26). Appellants therefore urge that Congress, in passing the Act conferring citizenship on Indians, exceeded its authority under those provisions of Sections 1 and 2 of the Fourteenth Amendment pertaining to citizenship and apportionment[14] (J.S. 11), and that Arizona has relied upon that allegedly unconstitutional enactment in granting Indians the right to vote.

Whatever may be the merit of that position, however, appellants have standing to raise those issues on a counterclaim for affirmative relief only if they can show actual, cognizable harm to themselves.[15] "The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit

[13] As used hereinafter, "Indians" refers to "tribal" or "reservation" Indians unless otherwise specified.

[14] At least implicitly, appellants have also challenged the power of Congress to declare Indians citizens pursuant to Art. I, Sec. 8, Clause iv ("The Congress shall have Power to * * * establish a uniform Rule of Naturalization * * *").

[15] Presumably, defendants have alleged the Fourteenth Amendment issue in their individual, not official, capacities. Whether appellants, in their individual capacities alone, can counterclaim in this kind of action is at least open to doubt. See 6 Wright and Miller, *supra*, § 1404, pp. 16–18, and cases there discussed.

others collaterally." *Warth* v. *Seldin,* 422 U.S. 490, 499. The counterclaim therefore must stand or fall, not on the abstract question whether the Act conferring citizenship on Indians is constitutional,[16] but on whether the Act and the Arizona voting laws together deprive appellants of their constitutional rights. The district court declined to reach that issue, holding only that the Fourteenth Amendment issues "appear to be premature for adjudication" (J.S. App. 7).

Since the district court did not address the issues requiring consideration by a three-judge court, direct appeal does not lie to this Court. *MTM, Inc.* v. *Baxley, supra; Gonzalez* v. *Automatic Employees Credit Union, supra.* In *MTM,* this Court decided that it had no jurisdiction over a direct appeal from an order of a three-judge court dismissing a suit on *Younger* v. *Harris* (401 U.S. 37) grounds, stating (420 U.S. at 804):

> [W]e conclude that a direct appeal will lie to this Court under §1253 from the order of a three-judge federal court denying interlocutory or permanent injunctive relief only where such order rests upon resolution of the merits of the constitutional claim presented below.

[16] Direct appeal cannot be supported on the theory that the district court declined to enjoin enforcement of the federal statute granting citizenship to Indians. To begin with, the statute is self-executing, and appellants in fact seek a *declaration* that it is unconstitutional, not an order directed to the federal appellees. Furthermore, operation of the federal statute itself causes no harm to appellants. They complain, not simply that Indians are citizens, but that they are citizens entitled to vote in county supervisorial elections. Citizenship alone does not confer that right. A citizen must also satisfy age and residency requirements. See A.R.S. 16–101.

The Court declined to consider not only the merits of the claim but also whether the dismissal itself was justified, saying the correctness of that decision was for the court of appeals to determine, *id.* at 804. Application of that principle to this case is consistent with the limited nature of this Court's appellate jurisdiction. Dismissal for lack of a justiciable controversy, like dismissal for lack of subject-matter jurisdiction, does not require a three-judge court. *Gonzalez* v. *Automatic Employees Credit Union, supra.* A single district judge could have refused to convene a three-judge court or the three-judge court could have dissolved itself and remanded to a single judge for dismissal (419 U.S. at 100, citing *Ex parte Poresky,* 290 U.S. 30). Since that dismissal is not "required to be heard" by a three-judge court, no direct appeal lies under 28 U.S.C. 1253. *Gonzalez, supra,* 419 U.S. at 101.[17]

The Court therefore should either dismiss this appeal or, as the Court did in ***MTM, supra,*** vacate the order of the district court and remand for entry of a new order from which appeal to the court of appeals may be taken.

---

[17] While it might be argued that the district court should have resolved whether allowing reservation Indians to vote on its face denies non-Indians due process and equal protection before issuing its reapportionment order, the failure of the district court to reach the merits of this issue is also a matter to be reviewed initially by the court of appeals. *MTM, Inc.* v. *Baxley, supra.*

II

THE DECISION OF THE DISTRICT COURT HOLDING THAT INDIANS ARE CITIZENS ENTITLED TO VOTE WAS CORRECT

Should this Court reach the merits, it should reject appellants' contentions that reservation Indians are not entitled to vote in county elections. Appellants contend, first, that reservation Indians are not, and without a constitutional amendment cannot be, citizens of the United States. They argue further that permitting reservation Indians to vote denies all non-Indians, as well as non-reservation Indians, their rights to due process and equal protection. These contentions do not merit plenary review.

A. CONGRESS HAS THE POWER TO CONFER CITIZENSHIP ON RESERVATION INDIANS

Section 1401(a)(2), Title 8, United States Code, states in part:

> (a) The following shall be nationals and citizens of the United States at birth:
>
> * * * * *
>
> (2) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe.

This provision, originally part of the Nationality Act of 1940, 54 Stat. 1138, was designed to end the continuing uncertainty whether reservation Indians were citizens of the United States. This Court had previously held that Section 1 of the Fourteenth Amendment did not confer citizenship on Indians,

Elk v. *Wilkins,* 112 U.S. 94, and Indians thus had become citizens only by the terms of particular treaties or statutes.[18] While the statutes clearly granted citizenship to Indians living at the time of the Act, it was not clear whether Indians born afterwards were automatically citizens as well. See *Totus* v. *United States,* 39 F. Supp. 7 (E.D. Wash.).

The Nationality Act of 1940 expressly conferred citizenship on reservation Indians at birth, and this Court has recognized that citizenship in numerous cases. See, *e.g., McClanahan* v. *Arizona State Tax Commission,* 411 U.S. 164; *Moe* v. *Confederated Salish and Kootenai Tribes,* Nos. 74–1656 and 75–50, decided April 27, 1976. Indeed, appellants do not deny that Congress has granted citizenship rights to Indians; rather they contend (J.S. 11–14) that Congress had no power to do so. Relying on *Elk* v. *Wilkins, supra,* they argue that Sections 1 and 2 of the Fourteenth Amendment permanently foreclosed reservation Indians from citizenship, and further suggest that citizenship for Indians is constitutionally incompatible with their unique status as federal wards.

The novel contention that the Fourteenth Amendment bars reservation Indians from citizenship finds little support in its language or purpose. Admittedly, that Amendment was not designed to *confer* citizenship on Indians, as it did on Negroes, since Indians were then regarded as owing primary allegiance to

[18] U.S. Department of the Interior, *Federal Indian Law,* 517–520 (1958). By 1924, approximately two-thirds of all Indians had acquired citizenship by treaty or statute.

their tribes. See Cong. Globe, 39th Cong., 1st Sess. 2890 *et seq.* (1866). The Court in *Elk* v. *Wilkins, supra,* so recognized. But it does not follow that the Fourteenth Amendment in addition affirmatively and perpetually denied citizenship to Indians regardless of any congressional desire to the contrary. Such a crabbed purpose would be inconsistent with both the language and the generous goals of that Amendment. "As appears upon the face of the [Fourteenth] amendment, as well as from the history of the times, this was not intended to impose any new restrictions upon citizenship * * *. It is declaratory in form, and enabling and extending in effect." *United States* v. *Wong Kim Ark,* 169 U.S. 649, 676. After adoption of the Fourteenth Amendment, as before, Congress retained its historical right to naturalize citizens of the United States.

In any event, even if Section 1 of the Fourteenth Amendment were construed to confine Congress' power to confer citizenship, the underlying legislative history shows that the words "subject to the jurisdiction thereof," contained in Section 1, would exclude from citizenship only those Indians whose tribal membership precluded the necessary loyalty to the United States.[19] At that time Indian tribes were regarded as quasi-foreign nations (Cong. Globe, 39th Cong., 1st Sess. 2893–2897 (1866)), often nations with which the federal government was at war. In 1871, however,

[19] Congress had already ratified numerous treaties, and enacted statutes, declaring certain Indians to be citizens. See note 18, p. 14, *supra.*

Congress declared by statute, 16 Stat. 566, that Indian tribes were no longer to be regarded as foreign nations but were to be governed by Acts of Congress. During the past century Indians have been made subject to various taxes, including federal income taxes (*Superintendent of Five Civilized Tribes* v. *Commissioner*, 295 U.S. 418), called to serve in the armed forces (*Totus* v. *United States, supra*), compelled to surrender land under the power of eminent domain (*Federal power Commission* v. *Tuscarora Indian Nation*, 362 U.S. 99), and charged with other similar responsibilities. In modern times, unlike the conditions of one hundred years ago, "a general statute in terms applying to all persons includes Indians and their property interests," *Federal Power Commission* v. *Tuscarora Indian Nation, supra,* 362 U.S. at 116. And, as the Court below noted, "Congress' power over the Indian tribes is plenary" (J.S. App. 6). Thus, even if the Fourteenth Amendment could be read as a general limitation on citizenship, it is no longer reasonable to view Indians as beyond the jurisdiction of the United States.

Nor is citizenship for Indians irreconcilable with their continued protection by the federal government. "[I]t is settled that the grant of citizenship to the Indians is not inconsistent with their status as wards whose property is subject to the plenary control of the federal government." *Board of Commissioners* v. *Seber*, 318 U.S. 705, 718. Recently the Court has rejected efforts by several states to impose taxes (without congressional authorization) on reservation

Indians, despite the fact that Indians received state services and were entitled to vote. *McClanahan* v. *Arizona State Tax Commission, supra,* 411 U.S. at 173; *Moe* v. *Confederated Salish and Kootenai Tribes, supra,* slip op. 12. It is well established therefore that Congress need not relinquish its guardianship over reservation Indians as a *quid pro quo* for the granting of citizenship.[20]

B. PERMITTING INDIANS TO VOTE IN COUNTY SUPERVISORIAL ELECTIONS DOES NOT BY ITSELF DENY APPELLANTS DUE PROCESS OR EQUAL PROTECTION

Appellants also argue (J.S. 17–26) that permitting reservation Indians to vote denies non-Indians, such as appellants, their civil rights, including the rights to due process and equal protection. To the extent that this argument depends upon speculation about future events, the district court correctly ruled that the question is prematurely raised (J.S. App. 7). Insofar as appellants may contend that extending voting rights to Indians on its face deprives appellants of constitutional rights, the argument is contrary to well-established precedent of this Court.

This Court has stated plainly that the right to vote need not be contingent, indeed cannot be made contingent, upon all voters having precisely the same degree or kinds of interest in the outcome. The Court

[20] Appellants also contend (J.S. 14–17) that reservation Indians are not residents of Arizona. The Arizona Supreme Court has decided to the contrary, *Harrison* v. *Laveen*, 67 Ariz. 337, 196 P.2d 456, and appellants suggest no persuasive reason why this Court should hold otherwise.

has held that a bachelor must be permitted to vote for members of the school board, *Kramer* v. *Union Free School District,* 395 U.S. 621, and persons without property have a right to vote in bond referenda, though the bonds in question will be serviced largely from a property tax, *City of Phoenix* v. *Kolodzieski,* 399 U.S. 204. To deny Indians the right to vote for county supervisors, appellants would have to prove that the Indians had no stake whatever in decisions made by the Board of Supervisors. That showing has not, and could not, be made. As the private appellees have indicated, Indians affect, and are affected by, the functions of county government in many important respects (Motion at 10–13).

Since Indians are citizens and residents of Apache County, it follows that they must be allowed to vote, on the basis of one-person-one-vote, for the county Board of Supervisors. Accordingly, the district court was correct in ordering the county to be reapportioned.

CONCLUSION

For the reasons stated, the appeal should be dismissed or, in the alternative, the judgment of the district court should be affirmed.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1572

APACHE COUNTY, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA, et al.,
Appellees.

Appeal from the United States Three Judge District Court for the District of Arizona

Opposition to Motion to Dismiss or Affirm

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ARGUMENT IN OPPOSITION

I. Preface.

This case was docketed April 27, 1976. A Motion to Dismiss or Affirm was filed on June 14, 1976 by some of the individual appellees. The United States requested an extension of time to respond to the Jurisdictional Statement which extension was granted. However, the United States failed to file a response by the July 14th deadline. Therefore, this reply brief is directed only to the individual appellee's Motion to Dismiss or Affirm. Appellants reserve

the right to reply to or move to strike as untimely any United States response.

II. Tribal Indians Are Not Citizens.

The appellees' examination of the Fourteenth Amendment as it relates to the citizenship of *tribal* Indians is entirely too superficial. The Fourteenth Amendment and Indian voting rights must be examined with the same historical analysis engaged in by this court in *Richardson v. Ramirez,* 418 U.S. 24 (1976).

A close study of the congressional hearings held prior to the adoption of the Fourteenth Amendment entirely refutes appellees contentions in their Motion to Dismiss or Affirm. A thorough analysis of the lengthy discussions reported in the congressional record relative to Indian citizenship is more appropriately reserved for briefs and oral argument. However, a few references demonstrate that it was the very clear intent of all congressmen who debated the proper language of the Fourteenth Amendment that tribal Indians be excluded from citizenship—the only debate was what language best accomplished that result. *The Congressional Globe,* 39th Cong., 1st sess. (1866) pp. 498-507, 2890-2897. For instance, Senator Doolittle stated:

> "Mr. President, the Senator from Michigan declares his purpose to be not to include these Indians within this constitutional amendment. In purpose I agree with him. I do not intend to include them. My purpose is to exclude them; . . . *"The Congressional Globe,* 39th Cong., 1st sess. (1866) p. 2895-2896.

Furthermore, the phrase "excluding Indians not taxed" in the amendment unquestionably referred to Indians not subject to *state property taxes.* No congressmen contended otherwise. *The Congressional Globe,* 39th Cong., 1st sess.

(1866) pp. 2890-2897. Even Senator Turnbull, who opposed putting this wording in Section One of the Fourteenth Amendment, accepted the language as referring to state property taxes when he stated:

> "If you introduce the words 'not taxed', that is a very indefinite expression. What does 'excluding Indians not taxed' mean? You will have just as much difficulty with those Indians that you say are in Colorado, where there are more Indians than there are whites. *Suppose they have property there and it is taxed;* then are they citizens?" *The Congressional Globe,* 39th Cong., 1st sess. (1866) p. 2893.

To suggest, as appellees do, that federal income taxes are taxes referred to by this phraseology in the Fourteenth Amendment is absurd since the Sixteenth Amendment to the Constitution permitting a federal income tax was not enacted for 45 years after the Fourteenth Amendment became law.

Clearly a thorough study of the intentions of those who wrote the Fourteenth Amendment is required before Tribal Indians are perfunctorily granted citizenship. In not a single case cited by the appellees has a court undertaken this fundamental examination of the meaning of citizenship under the Fourteenth Amendment as it relates to Tribal Indians.

III. The Tribal Indians Participation in Running a Government to Which They Owe No Allegiance Does Deprive the Non-Indian of Constitutional Guarantees.

The appellants' concern that they are deprived of due process of law and equal protection of laws if Tribal Indians vote in Apache County elections is not premature. As evidenced by Appendix A, the federal court since this appeal was filed has in fact positioned two and part of the

third supervisorial district entirely on the Navajo Reservation. Thus, it is a foregone conclusion that Tribal Indians shall control two (and may control all three) board seats. The Navajo will thereby impose taxes to which he is not subject, enact law to which he owes no allegiance and be immune from certain legal sanctions that govern the potential non-Indian board member.

The appellees misconceive the real issue. It is fundamentally and inherently unconstitutional and undemocratic that any person should exercise any degree of control over the laws of a government to which he is not subject. A single vote is important. Consequently, every vote cast in an election by a voter who is not subject to the laws of that government thereby diminishes the effectiveness of the vote of those who are subject to the laws and taxes.

The appellees' argument is tantamount to saying that one may be deprived of his voting rights if his vote would not change the outcome of the election.

The appellees speculate that state remedies may be available, but they cite none, and appellants are aware of no other remedy. Appellants only wish there were other remedies.

The appellees' contention that a total county tax levy is limited to $2.00 per $100 assessed valuation under A.R.S. § 11-251(12) is absolutely wrong. That limit is on only the "general current expenses". In addition to that tax the county may levy for special general purposes, road works, public works, teachers retirement, junior college tuition and many other purposes which are not subject to the $2.00 limit. Indeed, this past year the county tax levy exceeded $2.00 because of these other non-restrictive levys. There is no reason why a Navajo Board of Supervisors

cannot and would not effect a tax rate of $45.00 per $100 valuation as was done this past year in an Apache County reservation grade school district where the school board is dominated by non-taxpaying Navajos. This action was the subject of extensive litigation. *Kerr-McGee Corp. v. Chinle School District, et al.* (Maricopa County C-324239); *Navajo Communications Co., Inc., et al. v. Apache County, et al.*, Ariz. Fed.Ct. Civ. 75-740 PCT WEC.

Appellees assert that even though the reservation Indians have no stake in the responsibilities imposed by Apache County, they do have a stake in receiving the services of Apache County. However, the Supreme Court has already recognized in *Warren Trading Post Co. v. Arizona Tax Comm'n,* 380 U.S. 685, 690-91 (1965) that Arizona and its subdivisions are not obligated to service the reservation. The Court stated:

> "and in compliance with its treaty obligations the federal government has provided roads, education and other services needed by Indians, . . . *and since federal legislation has left the state with no duties or responsibilities respecting the Reservation Indians,* we cannot believe that congress intended to leave the state the privilege of levying this tax." (emphasis supplied).

The appellees have cited a couple of cases representing a minority viewpoint involving instances where a state may have jurisdiction over a tribal Indian. It is sufficient to note that the Supreme Court has not approved these ruling and would have to deviate greatly from its prior rulings on state court jurisdiction over Indians to do so. Also, even if the cases cited by appellees were the law, they do not cover most of the potential wrongs mentioned at page 20 of the Jurisdictional Statement which may exist if Tribal Indians participate in county government.

It is essential that these issues be examined closely by the court after full briefing and oral argument.

Respectfully submitted,

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(Appendix Follows)

Appendix A

LODGED May 12 1976
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District of Arizona
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In the United States District Court
for the District of Arizona

Leslie E. Goodluck, *et al.*, Plaintiffs, v. Apache County, *et al.*, Defendants.	Civ. 73-626-PCT (WEC)
United States of America, Plaintiff, v. State of Arizona, *et al.*, Defendants.	Civ. 74-50-PCT (WEC)

ORDER ADOPTING REAPPORTIONMENT PLAN OF PLAINTIFF UNITED STATES OF AMERICA

On September 16, 1975, this Court, sitting as a three judge court pursuant to 28 U.S.C. §§ 2281, 2282, and 2284, issued its Opinion and Judgment in the consolidated cases captioned above. On February 19, 1976, this Court issued

an Order implementing the provisions of its Opinion and Judgment of September 16, 1975. On March 22, 1976, this Court issued a Supplemental Post-Tribal Order amending and modifying, *nunc pro tunc*, its Order of February 19, 1976, and further implementing the provisions of its Opinion and Judgment of September 16, 1975.

IT IS ORDERED, ADJUDGED AND DECREED THAT:

1. The reapportionment plan of Defendant Apache County is rejected on the grounds that it fails to conform to the standards set out in *Baker v. Carr*, 369 U.S. 186 (1962); *Avery v. Midland County*, 390 U.S. 474 (1968); the Fourteenth and Fifteenth Amendments to the Constitution of the United States; the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, *et seq.;* and 42 U.S.C. §§ 1971 (a)(1) and (a)(2) A.

2. Reapportionment Plan "B" of Plaintiff United States of America, apportioning the Apache County Board of Supervisors Districts as follows: District 1—Chinle, Cottonwood, Dinnehotso, Lukachukai, Many Farms, Mexican Water, Red Rock, Rock Point, Rough Rock, and Teec Nos Pos Precincts (Total Population 10,600); District 2—Ft. Defiance, Ganado, Klagetoh, Nazhni, Sawmill, Steamboat, Wheatfields, and Wide Ruins Precincts (Total Population 11,355); District 3—Alpine, Concho, Eager, Greer, Lupton, McNary, Nutrioso, Puerco, Springerville, St. Johns, and St. Michaels Precincts (Total Population 10,343); is found to conform to the standards set out in Paragraph One of this Order, and is hereby adopted by this Court.

3. Defendants are hereby ordered to implement Reapportionment Plan "B" of Plaintiff United States of America immediately and to conform all Apache County District and Precinct lines to said plan within Thirty (30) days of this Order. Further, the Defendants are hereby enjoined

from conducting any and all phases of the election for the Apache County Board of Supervisors, including, but not limited to, filing and/or qualifying, and conducting the primary and general election, until such time as the terms of this Order are fully complied with. At that time and upon motion of any of the parties, this Court shall consider whether any additional affirmative relief is required to fully implement this Court's Order, Opinion, and Judgment.

Dated this 24th day of May, 1976.

Walter E. Craig
Judge Craig, District Judge